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ABSTRACT

Controversy surrounding the provision of psychotherapy as a related service to emotionally disturbed students is examined. Key issues in the question, including definitional issues, economic realities and financial concerns, and the need for related services for educational vs. medical reasons, are analyzed. Interpretations on the topic by state and federal courts, the Office of Civil Rights (OCR), and Special Education Programs (SEP) are presented, along with relevant sections of the regulations for P.L. 94-142, the Education for All Handicapped Children Act, and Section 504 of the Rehabilitation Act of 1973. (Texts of 10 interpretations are appended.) A polarization is noted, in which OCR and state and federal courts consistently find psychotherapy to be a related service within the meaning of the P.L. 94-142 regulations, while SEP has interpreted the law more strictly. Future uncertainty about regulatory and/or statutory changes is seen to further increase confusion on the issue. (CL)

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# NATIONAL NEEDS ANALYSIS IN BEHAVIOR DISORDERS

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## WORKING PAPER: PSYCHOTHERAPY AS A RELATED SERVICE

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## Preface

The project on National Needs Analysis in Behavior Disorders began its work in 1979 by collecting, reviewing, synthesizing and disseminating information on the "state of the art" relative to services for behavior disordered children and youth. In particular, the project focused on severe behavior disorders, adolescent behavior disorders, and human resource issues in behavior disorders. Those findings were published in a series of documents: one document on each of the three topics; an introductory document outlining the needs analysis model; and a symposium proceedings on the topic of leadership training in the area of behavior disorders.

As of September, 1981, the project began broadening its emphasis by applying the results of its previous work to inservice training for leadership personnel in the area of behavior disorders. As part of that effort, the project is producing and disseminating a series of working papers which address some of the specific concerns reiterated throughout the project's early work. This is the third of these papers. Like the first two, (Legislation, Litigation and the Handicapped and Disciplinary Exclusion of Seriously Emotionally Disturbed Children), it is printed in a format that we hope is amenable to ready reference and to the inclusion of additional papers as the project continues to follow up on topics that are of interest to leadership in the field of behavior disorders. As always, the project welcomes input relative to possible topics for future working papers.

One final note of explanation is in order. While the project has used the term "behavior disorders" in its previous publications (the rationale for which has been thoroughly discussed in those publications), readers will note that the working papers more frequently rely on the term seriously emotionally disturbed. This does not represent a change in philosophy. Rather,

since it is the legal terminology of Public Law 94-142, the nature of the papers dictate its use for accuracy's sake.

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Columbia, Missouri, 1982

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# PSYCHOTHERAPY AS A RELATED SERVICE

## INTRODUCTION

### Background

Few aspects of Public Law 94-142 or the subsequently promulgated regulations have created more controversy than references to the provision of related services for handicapped children. The relevant passages of both law and regulation have been subject to intense scrutiny by parents, local and state education agency (LEA, SEA) personnel, Special Education Programs (SEP) personnel (formerly the Office of Special Education), the Office of Civil Rights (OCR), impartial hearing officers, and various state and federal courts. On some occasions those passages have been thoroughly dissected, with an eye to examining virtually every word therein and an attempt to further define or clarify their meaning(s) as necessary. On other occasions the attempt has been to step away from the individual words in order to ascertain a "general" intent or the Congressional intent. Unfortunately, neither approach has resulted in consensus regarding exactly when and how public school districts must provide related services to their handicapped children and youth.

A major portion of the controversy generated relative to related services has centered specifically around the provision of psychotherapy as a related service. This controversy is of particular import in the education of emotionally disturbed children since it is this population for whom psychotherapeutic services are most likely to be recommended. The controversy is very complex and proceeds on many levels. The cost of providing psychotherapy is of immense concern to local and state service providers and is, in large part, responsible for the heated discussions concerning the interpretation of related services as delineated in law and regulation.

Professional debate concerning efficacy of psychotherapy as well as the range of techniques that fall within the parameters of psychotherapy further obscure the primary issue of delineating exactly what is encompassed in the term related services and under what conditions local and state education agencies must provide it. More specifically, for the purposes of this paper, the question is, "Is psychotherapy a related service within the meaning of Public Law 94-142 and its implementing regulations; and if so, under what circumstances must local and/or state education agencies provide it to handicapped children, specifically those children labeled seriously emotionally disturbed (SED)?"

Purposes

There are several purposes of this paper. The first is to state as clearly as possible the key issues involved in a discussion of psychotherapy as a related service for the seriously emotionally disturbed. Inherent in this purpose is the intent to assist professionals in the field of serious emotional disturbance by highlighting the range and complexity of concerns that surround this issue, thereby providing them with a framework to assist in policy formation or clarification.

A second purpose of this document is to summarize existing interpretations of the related services mandates. These interpretations include Office of Special Education (currently Special Education Programs) policy statements, Office of Civil Rights findings, and state and federal court determinations.

Yet another purpose of this working paper is to highlight an extensive compilation of documents on this topic (and any other topic relative to Public Law 94-142 or Section 504) that is available to professionals involved in any aspect of service to handicapped persons. That reference source is

entitled Education for the Handicapped Law Report (EHLR), published commercially by CRR Publishing Company. The major reference documents and some of the analysis for this paper have been compiled by EHLR staff. Additionally, material from the Second National Institute on Legal Problems of Educating the Handicapped, sponsored by CRR Publishers, has been referenced. Toward the end of familiarizing professionals in serious emotional disturbance with these reference materials, they are not only listed in the bibliography of this paper, but the texts of the interpretations cited herein are also reproduced in their entirety in the appendices.

Finally, it is hoped that the information presented can be clearly summarized and future directions discussed. The current governmental review of the implementing regulations for Public Law 94-142 may have a significant impact on the topic of related services in general and psychotherapy as a related service, specifically. Some thoughts on the implications of that action are also proffered.

## Audience

Although the information presented in this working paper may be of interest and/or use to any professional in the field of behavior disorders, it is specifically designed to be of assistance to three main populations: SEA administrators/supervisors; LEA administrators/supervisors; and teacher trainers in institutions of higher education (IHEs). In the case of SEA and LEA administrators/supervisors, the information is designed to assist them in policy analysis, development and clarification. For IHE persons, the information may be useful in their teacher training activities as well as in the various leadership roles they often assume within their states.

Statement of Issue

While related services is mentioned in Public Law 94-142 [Section 1401 (18)] as part of the requirements of a free appropriate public education, Section 1401(17) of the statute provides the actual definition of related services.

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

The content of the statute itself is echoed in the implementing regulations. Section 300.1 of these regulations states the purposes of the act. In part, these regulations read:

> (a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs ... (emphasis added)

The regulations (Section 300.13) then proceed to repeat, essentially verbatim, the wording of the statute in terms of the meaning of related services:

> (a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training. (emphasis added)

At another point in the regulations the terms delineated in this definition are further expanded. This expansion is presented in a later section of the paper.

Thus, the controversy over psychotherapy as a related service proceeds on two levels. The first involves whether or not psychotherapy is "required to assist a handicapped child to benefit from special education." The second line of controversy is whether or not psychotherapy (if needed for the child to benefit from special education) is a psychological or counseling service as opposed to a medical service which is only for "diagnostic or evaluation purposes."

It is important to note here that the issue is not one of whether or not a seriously emotionally disturbed child needs psychotherapy. Rather the issues are: 1) does the seriously emotionally disturbed child need psychotherapy to benefit from special education, and 2) if he/she does, is it a service that Public Law 94-142 requires an LEA or SEA to provide payment for? As the ensuing discussion will indicate, the focus of most discussion has centered on the second question. Due to the nearly impossible task of separating a student's emotional needs from his/her special educational needs, most interpretations of the law and regulations focus on the second question, i.e., is psychotherapy a related service within the meaning of Public Law 94-142 and its implementing regulation?

The informed reader will note that the preceeding statement of the issues made no mention of Section 504. Due to the broader nature and less specific language of Section 504, those persons with mandated responsibility for enforcing Section 504, i.e., OCR, rely upon the specificity of Public Law 94-142 and its regulations when considering related services questions. For that reason, the language of Public Law 94-142 and its implementing regulations are essentially controlling for interpretations of Section 504. However, at a later point, the Section 504 statute and regulations relative to related services will be presented.

Before summarizing the current interpretations that speak to the two questions listed above, several key issues and concepts will be examined. These are areas of concern that have had influence on the positions adopted by LEAs, SEAs, OCR, SEP, and the courts.

## ISSUES AND CONCEPTS FOR CONSIDERATION

As indicated previously, consideration of a few key issues and concepts may assist in a clearer understanding of the meaning of and reason for various interpretations of the implementing regulations of Public Law 94-142 relative to psychotherapy as a related service. These interpretations, to be discussed in the next section of this paper, have come from a variety of sources, each with a different relationship to the seriously emotionally disturbed child and each with a different role in terms of service provision. These varying relationships and roles are primarily responsible for the diverse and sometimes contradictory nature of the interpretations. This diversity arises, not solely or necessarily from self-serving interest, but also from varying familiarity and perspectives on the issues and concepts presented below. Therefore, a brief review of the range of those issues and concepts may prove helpful to the reader in gaining a fuller appreciation of the complexities responsible for the various interpretations delineated in the next section.

### Definitional Issues

The language used in both Public Law 94-142 and the subsequent regulations was "common usage" language. Congress, in an attempt to insure educational opportunity for handicapped children, described a general philosophy and intent as it constructed Public Law 94-142. With the exception of the specific handicapping labels and their definitions, the regulations implementing Public Law 94-142 followed much the same pattern. In many respects this "general" vocabulary was the result of three factors: 1) the diversity of the populations affected by these regulations; 2) the broadness of range in the services specified; and 3) the lack of universally accepted vocabulary and definitions within the field of special education itself. As a result,

plementing regulations by which SEAs were bound in return for federal
s presented many instances in which the vocabulary used made the
t" of the law quite clear but did not carry an established or accepted
tion by which to implement that law. Related services is one such
lary example. Unfortunately, the language used to clarify (define)
words was also composed of vocabulary that did not always have a gen-
y accepted definition. The result was the identification of a basic
ce (related service) and examples of such a service (to benefit from
al education, psychological services, counseling services, medical ser-
s) which had no operational definition or criteria by which determina-
could be made regarding the necessity of SEA or LEA provision of psy-
herapy for handicapped children, specifically for seriously emotionally
turbed children and youth. As later parts of this paper will discuss,
courts, OCR and SEP have not been able to clarify this issue despite re-
ted attempts.

nomic Realities and Financial Concerns

It is probably true, as some observers suggest, that there are several
eas of Public Law 94-142 and its implementing regulations that are unclear
d/or open to a variety of interpretations. However, psychotherapy as a
lated service is one of the issues that has created considerable contro-
ersy one reason being that the provision of psychotherapy is extremely ex-
ensive. The general questions of who is responsible to pay for a related
ervice and exactly what services are considered to be related services take
n new meaning in light of the potential expense involved in providing a
specific related service such as psychotherapy. Those who argue for a narrow
interpretation of the regulations; i.e., that psychotherapy is not a service
necessary to allow the child to benefit from special education or that

psychotherapy does not fall within the definition of related services, advance these concerns:

1. Diminishing fiscal resources result in a realistic basis for arguing that SEAs and LEAs cannot assume the additional fiscal responsibilities that would, by necessity, accompany a broad interpretation of the regulations. It is not a question of "preferring" to spend dollars elsewhere, rather it is that there are no dollars available for expenditures of this magnitude. Payment of psychotherapist fees would impose an intolerable fiscal burden on SEAs and LEAs.
2. Broad interpretation of these regulations will result (indeed have already resulted) in other state agencies using the regulations to indicate that they no longer have financial responsibility for psychotherapeutic services. Bluntly stated, these agencies have shifted dollars previously spent on psychotherapeutic services to "beef up" other portions of their budget and insist that SEAs or LEAs are now fiscally responsible for all psychotherapeutic services. The problem is especially critical in residential placements because more dollars are involved.
3. Similarly, broad interpretation of these regulations is increasingly resulting in a situation in which private insurance companies are refusing benefits to parents for their child's psychotherapeutic costs on the premise that the SEA/LEA must provide those services at no charge to the parents. Using standard governmental waivers which relieve payment responsibility in instances of legally mandated services or threats of diminished or depleted future benefits to the family, in-

surance companies are seeking to avoid payment of still another and more expensive service such as psychotherapy. Despite repeated interpretations to the effect that existing regulations do not relieve insurance companies of their obligations, problems of this nature are on the increase.

4. Although SEP policy interpretations indicate that Part B funds can be used to pay for psychotherapy services, SEAs and LEAs find this inadequate for two reasons. The first is that there are insufficient monies allocated to cover the cost of mandated services, excluding psychotherapy, much less including it. Secondly, there are many other services that children must receive with these funds, not just psychotherapy.
5. All financial questions aside, there is still much debate concerning the efficacy of psychotherapeutic services for children. SEAs and LEAs with reservations concerning the efficacy of psychotherapy for seriously emotionally disturbed children and youth are loath to expend large amounts of their limited fiscal resources on such a service.
6. An ultimate concern has been expressed regarding SEAs assuming increasingly greater responsibilities for coordinating and providing not only educational services, but social, psychological and health services as well. One very basic issue involves whether or not this is an appropriate role for education. Another issue concerns both the role and financial support of other state agencies which have historically provided those services.

7. Although psychotherapy is the specific issue under consideration herein, the problem must also be viewed in the context of the larger issue of related services and the potentially non-exhaustive nature of such services. At some point, no SEP, OCR or court decision can force SEA or LEA payment for some services. It becomes no longer is a question of reallocation or redistribution of funds, but simply that no funds exist for services beyond a certain point.

Those who speak for a broad interpretation of the related services regulations; i.e., that when psychotherapy is needed by an SED child it is required in order that child to benefit from special education and/or that psychotherapy does fall within the regulatory meaning of related service, advance these arguments:

1. It is impossible to separate the emotional needs from the educational needs of a seriously emotionally disturbed child. After all, the handicapping condition which kept the child from benefitting from regular education is emotional in nature. Therefore, for seriously emotionally disturbed children in particular, progress on emotional needs is a requisite for educational progress.
2. Cost cannot be allowed to enter into a discussion of regulatory interpretations. There is certainly case law precedent for the fact that lack of financial resources cannot be offered as an excuse for not providing children mandated services. If psychotherapy fulfills the definition of related services, i.e., is required for the child to benefit from special education, then it must be provided at no cost to the parents.

The differences between those who advocate a broad interpretation of the regulations versus those who advocate a narrow one can be too easily set up as a dispute between those who care about seriously emotionally disturbed children and youth at any price and those who care more about money than handicapped children. This is not the issue at stake. The heart of the issue lies in questions like these:

1. What is the role of public education in today's society?
2. How does public education fit into the scheme of a range of state agency services; i.e., mental health, social services, public health, etc.?
3. What are taxpaying citizens' priorities concerning support of public education?
4. At what point, if any, are professional educators responsible for decision-making in public education rather than the public which support it?
5. Are there any limitations to the rights of handicapped children in their pursuit of an education at public expense?

In many ways, these are philosophical and political questions. However, in reality, they cannot be separated from the process that leads to the interpretations of the Public Law 94-142 regulations and the final decisions as to who pays for psychotherapy as a related service.

Related Services for Educational Reasons vs. Medical Reasons

A variation on an earlier discussion involves the attempt to differentiate related services required for educational reasons vs. related services required and other reasons, usually medical ones. Although our concern here is for psychotherapy, the issue applies to all related services, for example, physical therapy. The question to be asked here is not whether or

not a service is <u>needed</u> but whether or not it is needed for educational reasons. Thus, it is possible for a child to need psychotherapy as a medical service but not as an educational one; and, if that is the case, how is such a differentiation determined? In theory, this distinction appears possible. The difficulty lies in the criteria for determining the distinction. Some attempts at this distinction have included the following criteria:

1. The service provider determines the need. Thus, the academic discipline or certification/licensure defines the reason for service. If therapeutic services are provided by one who is primarily a professional educator and/or whose state qualifications are educational in nature then the service is considered to be for educational reasons. If the service provider is one who is primarily a mental health professional and/or holds state qualifications that are mental health or medically oriented, then the service is considered to be for medical reasons.
2. The setting in which the psychotherapy is provided distinguishes educational reasons from medical reasons. In this case, services provided within the school environment are considered for educational reasons while those provided in a clinic, private office or hospital are for medical reasons. This criterion would need further definition in the event of residential placement. In that case are the services medical by reason that the whole environment is removed from the public school, or is that environment the child's school and those services become educational because they occur at the child's school?

3. The duration of the treatment is yet another criterion that has been used. In this case, short-term treatment is seen as educational in nature while long-term treatment is medical.

Particularly at the state level of interpretation, where questions are often considered on a case-by-case basis, these criteria are used singly or in combination.

Other Issues

There are some additional concerns that affect the interpretations of the implementing regulations. These include:

1. The single line of responsibility created for SEAs under Public Law 94-142 was a directive given with no accompanying implementation power. In most states, SEAs do not have the authority to direct other existing state agencies to provide services to handicapped children. Each of these agencies operates within its own statutory parameters. Since many of the related services that seriously emotionally disturbed children may need, including psychotherapy, may come from sources outside of the public schools, the ability, or lack thereof, of SEAs to direct those services forces them to provide and/or contract for such services.
2. Related to the above concern is that of SEAs being required to insure that seriously emotionally disturbed children receive necessary related services. Although insuring does not require that they provide the services, their lack of ability to coordinate and supervise services across other agencies, in reality, puts them in the position of providing

or paying for the provision of services. If other agencies fail or refuse to provide a related service, SEAs or LEAs must insure its provision using their own resources.

3. In addition to other state agencies shifting the responsbility of psychotherapy to SEAs and LEAs, private insurance companies have attempted to refuse payment of insured services on the grounds that SEAs and LEAs are responsible for such costs.

In the midst of the issues and concerns that surround the controversy of psychotherapy as a related service, several questions need to be asked of ourselves. These include:

1. What is best for seriously emotionally disturbed children and youth?
2. What is professionally defensible?
3. What is administratively defensible?
4. What is legally defensible?
5. Is there danger of losing Public Law 94-142 and its implementing regulations as a result of controversy created by too broad or too narrow interpretations?

With questions this difficult at the root of decision-making, it is not surprising that interpretations concerning psychotherapy as a related service display a great and sometimes contradictory diversity.

## INTERPRETATIONS

In an effort to provide clarity of content and organization, the interpretations presented in this section will be organized into two broad categories. This first category will deal with the question, "If psychotherapy is recommended for an SED child, is it needed in order for the child to benefit from special education, thus becoming a related service as defined in the regulations implementing Public Law 94-142?" The second group of interpretations will center on the question, "Even if psychotherapy is needed for an SED child to benefit from special education, does it fall within the parameters of related services as defined by the implementing regulations; that is, is it a psychological or counseling service rather than a medical one?" Within the discussion of these questions, interpretations will be presented that include those of state and federal courts, the Office of Civil Rights (OCR) and Special Education Programs (SEP).

### Psychotherapy - Needed to Benefit from Special Education?

Reiterated, the questions is, "If psychotherapy is recommended for an SED child, is it needed in order for the child to benefit from special education, thus becoming a related service as defined in the regulations implementing Public Law 94-142?" The obvious answer is that it depends upon the child. It would appear logical that in some cases emotional progress through psychotherapy is essential to enable the child to benefit from special education. In other instances a child who may need psychotherapy will be able to benefit from special education without it. The problem, of course, is that it is virtually impossible to determine which of these situations exists. There are, literally, no generally accepted criteria which could be used to assist SEA or LEA personnel in making such a distinction. The apparent unsolvability of such a distinction has led most interpreters to avoid this aspect of

the issue and focus instead on the definitional issues presented in the next section. However, there are two major court decisions which speak to this problem.

In North v. District of Columbia Board of Education the judge, in referring to the problem of assigning responsibility for the services of an emotionally disturbed, learning disabled youth with medical problems, states that "...all of these needs are so intimately intertwined that realistically it is not possible for the court to perform the Solomon-like task of separating them." In the case of Kruelle v. New Castle County School District the judge refers to the North v. District of Columbia case when writing the opinion concerning financial responsibility for a retarded, emotionally disabled youth with cerebral palsy. The judge states that the focus in determining responsibility for services is on whether or not the service is for educational purposes or for "medical, social or emotional problems that are segregable from the learning process." The opinion then states that the North v. District of Columbia case "collapsed the distinction by declaring the impossibility of separating emotional and educational needs in complex cases." Further the judge found North to be "almost indistinguishable on the facts from the present case" and went on to reason that "the claim inextricability of medical and educational grounds for certain services does not signal court abdication from decision-making in difficult matters. Rather, the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning."

It would appear then that the inability to separate therapeutic needs from educational ones results in the assumption that psychotherapy is a related services when considered in light of the definition which delineates related services as those necessary in order for a child to benefit from special education.

Psychotherapy - Psychological, Counseling or Medical Service?

Given the impossible task of separating therapeutic needs (specifically, psychotherapy) from educational needs, it might seem reasonable to conclude that when an SED student needs psychotherapy, it must always be considered a related service and therefore must be provided at no cost to the parents. There is, however, another important set of considerations. The implementing regulations for Public Law 94-142 provide an expanded definition of related services which lists examples of included services. This text is provided in the first section of this paper, but it may be of assistance to examine it again:

> (a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools and parent counseling and training. (emphasis added)

Thus, the regulations indicate that psychological and counseling services are examples of related services, but that medical services are related services only when used for diagnostic or evaluation purposes. Admittedly the listing of related services within the regulations is not all inclusive. The following comments from the Senate Report speak directly to this lack of inclusivity:

> The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

However, even this elaboration does not clarify the situation. Psychotherapy is not,in fact, specifically included or excluded from the regulations. The question that then must be addressed is "Even if psychotherapy is needed for a child to benefit from special education, does it fall within the parameters

of related services as defined by the implementing regulations; that is, is it a psychological or counseling service rather than a medical one?" If the former is true then psychotherapy needed for the student to benefit from special education is clearly a related service. If however, psychotherapy is a medical service, then it must be provided as a related service only for diagnostic or evaluation purposes.

Most interpretations have focused on this aspect of the issue. That focus has taken two forms. Some interpretations have tried to answer the question by focusing on the provider of the therapeutic service in order to determine whether or not psychotherapy qualifies as a medical service. The other major approach has been to argue the definitions of the vocabulary words involved (psychological services, counseling services, medical services) in order to determine which category psychotherapy belongs to. For reasons that will become apparent shortly, SEP has focused primarily on the service provider aspect of the issue while OCR and the courts have looked more broadly at the general meaning of the vocabulary.

Although examination of the service provider in order to determine whether or not psychotherapy falls within the parameters of the related services definition might appear to be convoluted logic, the impetus for this approach is within the regulations themselves. Following the expanded related services definition presented above, the regulations proceed to further define the vocabulary of that section. As can be seen, the definitions of concern here are couched in terms of the service provider:

> (2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel ...
>
> (4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services ...

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessement procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents. (Reg. 300.13)

Thus, it is virtually impossible for an SEP policy letter to issue an opinion divorced from the concept of service provider since the vocabulary words are defined in light of the provider.

Consequently, some SEP policy letters focused squarely on the service provider when assisting states in interpreting the related services regulations. In October, 1978, a policy letter response to Janda states "... if psychiatric therapy is interpreted in your state as a medical service (i.e., administered by a licensed physician), this service would not be required under Part B." A June, 1979, response to Millman (the most recent treatment of the subject) implied that psychotherapy provided by a psychiatrist (for other than evaluation or diagnostic purposes) was currently being considered a medical service. However, that same service provided by a non-medical licensed service provider could be considered a related service. The EHLR summary of the response states "where 'psychotherapy' can be provided, under state law, by someone other than a psychiatrist (e.g., psychiatric social worker) and psychotherapy is needed to assist the handicapped child to benefit from special education, psychotherapy might be considered a related service under Reg. 121a.B." The final part of the letter indicates that the question of whether or not psychotherapy provided by a psychiatrist (for other than evaluation or diagnostic reasons) can ever be a related service is under study. Again, in an October 30, 1979, policy letter to Beck, the fol-

lowing statement appears,"The issue of whether psychotherapy should be included under related service is under study."

Other SEP policy letters did not speak directly to the service provider. However, it is nonetheless implicit in references to the vocabulary of psychological, counseling or medical services. An early (1977) letter to Minsky from SEP sets the tone for this type of response and places the responsibility on individual state determinations of medical vs. counseling services. The EHLR digest of the response states "If State interprets psychotherapy as 'medical service,' LEA is not obligated to provide such service since Reg. 121a.B. requires medical services for diagnostic and evaluation procedures only; if State interprets psychotherapy as 'counseling services' services must be provided at no cost to parents if they are listed in IEP as related services." The crux of the matter still lies in the definition of medical and counseling services which in turn, by regulatory definition, lies in the role of the service provider.

As has been indicated, several SEP letters alluded to the existence of a study of the psychotherapy issue. In the summer of 1980, SEP (then Bureau of Education for the Handicapped) did, in fact, submit a draft policy statement to then Department of Education Secretary Shirley Hufstedler. The position assumed by SEP in that draft was substantially different than its previous policy decisions. However, that draft was returned for unspecified revisions and has never been resubmitted. Given the length of time that has elapsed and the intervening shift in political climate which appears unfriendly to any broadened interpretations, it must be assumed that SEP policy remains consistent with statements expressed in its early policy letters.

OCR has consistently taken the broader focus on this issue. This is, no doubt, the result of the broader focus and general intent of its guiding

legislation, i.e., Section 504. The regulations of concern here are as follows:

> Reg. 104.33 Free appropriate education
>
> ...(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Regs. 104.34, 104.35, and 104.36... (emphasis added)
>
> (c) Free education - (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped persons or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian ... (emphasis added)
>
> Reg. 104.37 Nonacademic services.
>
> (a) General. (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
>
> (2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment. (emphasis added)
>
> (b) Counseling services. A recipient to which this subpart applies that provide personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interest and abilities ... (emphasis added)

As can be seen, neither Section 504 nor its implementing regulation specifically define related services. Instead, as will be subsequently discussed, they rely upon the definitions presented in Public Law 94-142. For that reason, although OCR is officially interpreting Section 504, they are, in

practice, also interpreting Public Law 94-142.

In its earliest significant treatment of the psychotherapy as a related service issue (July, 1979), OCR offered the following in response to a complaint filed against the Berkeley (CA) Unified School District. The student in question had an IEP which provided for psychotherapy. However, the district considered it to be a medical service and therefore not a related service. The OCR letter of finding stated that the district violated Section 504 by not paying for the cost of the psychotherapy. The reasoning presented says, in part, "the Office of Civil Rights has determined that psychotherapy is a psychological service and, therefore, a related service, as it is necessary for /student/ to fulfill his special educational needs." The reasoning which led to this statement is not offered. Rather OCR indicates that it was determined based upon the relevant regulations implementing Public Law 94-142.

Later that same year, in October, 1979, OCR issued a similar finding against the Connecticut Department of Education. Finding that Connecticut statutes were in conflict with Section 504 and Public Law 94-142 regulations, OCR stated:

> "However, medical, emotional and psychiatric services are within the meaning of related aids and services of Section 84.33(b) when it is shown they are necessary to enable a qualified handicapped person to obtain the same result, to gain the same benefit or to reach the same level of achievement to the maximum extent possible."

Finally, in February of 1980, OCR issued a lengthy letter of finding relative to a complaint brought against the Illinois Governor's Purchased Care Review Board (GPCRB). In this letter OCR presented a complex argument which resulted in the finding that psychotherapy for "mentally ill" persons is a related service. The argument, noting that the GPCRB determines psychotherapy to be a "non-educational" service, proceeds in this manner: (1) neither Section 504 or its implementing regulations define related services. Rather, they rely upon the definition of the term as it is presented in the implement-

ing regulations of Public Law 94-142; (2) the Public Law 94-142 regulations utilize the term psychological services in its expansion of related services; (3) although the definition of psychological services does not include the word psychotherapy, regulation 121a.B (in which it is pointed out that the "list of services is not exhaustive") clearly indicates the Congress did not intend to restrict any particular service from that list; (4) therefore, although psychotherapy is an ongoing medical service, that does not preclude it from "constituting a related service."

Clearly, OCR has consistently taken the position that ongoing (i.e., not for evaluation or diagnosis) psychotherapy is a related service because it falls within the general meaning of the word psychological services. A 1979 Montana State court case, In the Matter of "A" Family, also adopted this broader stance. After a review of the pertinent regulations and a note concerning the "confusing if not conflicting" nature of things, the judge writing for the majority turned to the dictionary for a definition of psychotherapy. Noting that "Webster's Seventh New Collegiate Dictionary (1965) defines 'psychotherapy' as 'treatment of mental or emotional disorder or of related bodily ills by psychological means'," the decision then states, "By that definition, psychotherapy comes within the meaning of the term 'psychological services'." The decision goes on to clearly conclude, "It is enough to say that we find psychotherapy is not regarded as medical services for the purpose of determining 'related cost'... but rather is included as part of psychological services, which are a part of the related costs." Although the five member court was not uniform (5-2, with a dissenting opinion), the case is generally representative of the broader view taken by the courts in this matter.

Summary of Interpretations

Based on a review of the relevant interpretations it appears that OCR and the state and federal judiciary consistently find psychotherapy to be a related service within the meaning of the Public Law 94-142 regulations. Whether because they find educational and emotional needs unseverable or because they feel that, definitionally, psychological services ecompass psychotherapy, theirs is the broader perspective.

SEP, on the other hand, has "charted a course which remained generally close to the language in the regulations" (Akin, et. al.) and in so doing has: 1) focused on the service provider, 2) focused on state definitions, and 3) indicated that further study was underway.

A draft paper on Psychotherapy as a Related Service (Akin, et. al.) emanating from the Second National Institute on Legal Problems of Educating the Handicapped sums up the current situation very well. Although there are relatively few cases, decisions and/or policy letters from which to draw conclusions,

> ...even at this point a distinct polarization seems to be occurring: operating under vague policy guidelines, increased demand for services, and mounting fiscal pressures, education agencies (SEP) tend to interpret the law strictly in the hope of relieving themselves of the anticipated high costs of some forms of psychological services; the courts (and OCR) on the other hand, interpreting admittedly liberal Federal statutes and lacking the expertise to substantively evaluate conflicting opinions of other disciplines, prefer to err on the other side, i.e., in favor of requiring the provision of services (parenthetical material added).

## THE FUTURE

The controversy over psychotherapy as a related service has grown steadily since the beginning of the implementation of Public Law 94-142 and Section 504. As the financial ramifications of providing related services, in general, and psychotherapy, specifically, became apparent, debate, due process actions and litigation have increased. The complexity of the issue and resulting lack of uniformity of interpretation by the decision sources (SEP, OCR, courts) have resulted in heightened controversy and pressure on those decision sources to resolve the issue. At a time when controversy was seemingly at its highest point yet and concerned professionals from many fields were making a concerted effort to seek resolution, national elections brought a new administration into the White House and many new faces into Congress. Priorities of that administration (which include ones aimed at reducing the federal role in special education) are at odds with the specificity of the implementing regulations of both Public Law 94-142 and Section 504. Concerted efforts have been underway since 1980 to substantially reduce the regulating requirements of Public Law 94-142 and Section 504 and, in some cases, to alter the statutes themselves

While the form that the related services statutes and regulations might eventually take is unknown, there are some indications of what might be expected. At this writing, under a presidential directive to reduce regulations, the Office of Special Education and Rehabilitation Services is preparing a revised set of regulations for implementing Public Law 94-142. Based upon comments in a September, 1981 preliminary review of the regulations, a May, 1981 set of recommendations from the influential NASDSE (National Association of State Directors of Special Education) and a recent (February, 1982) Education Week summary of a departmental draft of changes to be proposed by

the Department of Education, it is possible to anticipate some probable directions that the SEP revisions will take.

It is likely that the proposed related services changes will delete any regulatory language that goes beyond the statute. Reasons that have been cited to support the need for such a change include: 1) the fiscal restraints under which LEAs and SEAs operate compared to the unusually expensive nature of many related services; 2) the tendency of other human service agencies as well as insurance companies to refuse to pay or provide for related services for which they did previously pay or provide; 3) the eroding distinction between medical and educational services as a result of increasingly broadened interpretations and 4) the unintended expansion of education from instructional services into health and/or social services. All of these reasons have already been discussed at greater length in a previous section of this paper.

It is also possible that there will be efforts to amend the statutory language regarding related services, although the parties urging such action are not as cohesive about the direction of such changes as are the parties recommending regulatory change. Statutory changes might include: 1) changes to categorize related services into two types, those provided for handicapped students and those provided to all students; 2) a clear delineation of medical and counseling services for diagnostic and evaluation purposes only; and 3) changes to allow states to individually define the terms used in the related services statutes.

These measures, i.e., changes in statute and/or regulations, are not "foregone" conclusions. Despite an administration which supports substantial changes and a general political climate which is conducive to such change, the measures have many detractors. NEA (National Education Association), numerous influential advocacy agencies, parents, related service providers and many professionals within the field are all vocal critics of regulatory or

statutory changes which might reduce the services available to handicapped children and youth.

Thus, at a time of high controversy and dichotomized interpretations as discussed throughout this paper, yet another complicating factor has intervened - the future existence and/or form of the regulations and/or statutes themselves. While time has tempered some early efforts for repeal of the laws in question, it has not substantially tempered the drive for reduction of the federal role in special education. It would have been difficult to predict an outcome or direction of the controversies discussed earlier in the paper. The current political uncertainty not only effectively prevents any predictions, it also has left most service providers with a "wait and see" attitude.

At this point the entire the entire issue is "on hold" in many respects. SEP and OCR have both reduced their efforts toward interpretations, i.e., policy letters and letters of finding, respectively. While the courts do not have the prerogative to "wait and see," no new cases have recently spoken to the issue. It remains to be seen whether the national level resolution of the content of the statutes' implementing regulations in question will result in a new set of statutes and regulations upon which to base new interpretations or in the resumption of the interpretive process from the point at which it now stands. In either case, the issue remains far from resolution.

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In the Matter of "A" Family, 79-80 EHLR 551:345-551:353.

Kruelle v. New Castle County School District, 80-81 EHLR, 552:350-552:358.

North v. District of Columbia Board of Education, 79-80 EHLR, 551:157-551:161.

### Office of Civil Rights Letters of Findings

Berkeley (CA) Unified School District, 2 EHLR, 257:191-257:194.

Connecticut Department of Education, 2 EHLR, 257:57-257:58.

Illinois Board of Education, 2 EHLR, 257:82-257:96.

### Special Education Programs Policy Letters

Beck, 2 EHLR, 211:145 - 211:146.

Janda, 2 EHLR, 211:205 - 211:206.

Millman, 2 EHLR, 211:104 - 211:105

Minskey, 2 EHLR, 211:19 - 211:21.

Foster, S. & Matzke, M. Proposed changes in rules on education of handicapped. Education Week, February 24, 1982, I, 14-16.

Recommendations To Revise Regulations for P.L. 94-142. National Association for State Directors of Special Education, May, 1981.

## APPENDICES

Following are the full texts of the interpretations cited in this paper. They are presented in the order in which they are referenced in the body of the paper. For purposes of ready reference that order is as follows:

North v. District of Columbia Board of Education

Kruelle v. New Castle County School District

Janda (SEP)

Millman (SEP)

Beck (SEP)

Minsky (SEP)

Berkeley (OCR)

Connecticut (OCR)

Illinois (OCR)

In the Matter of "A" Family

TY WESLEY NORTH, *et al.*,
Plaintiffs

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, *et al.*,
Defendants

Civil Action No. 79-0127

D. District of Columbia
April 9, 1979

HAROLD H. GREENE, District Judge

Plaintiff, a multiply handicapped sixteen year old, and his parents, sought declaratory and injunctive relief under, *inter alia*, the Education for All Handicapped Children Act, § 504 of the Rehabilitation Act of 1973, and the 5th Amendment to the U.S. Constitution, to determine whether plaintiff needed to be placed in a residential facility and, if so, whether the D.C. Board of Education was responsible for providing that placement. Plaintiff's request for a temporary restraining order, to require that defendants provide plaintiff with an emergency residential placement, was denied on January 15, 1979, since by that time plaintiff had been moved to a residential treatment facility offering psychiatric therapy and education, as well as attention to his medical problems, and he was, therefore, not in immediate jeopardy.

*HELD*, District of Columbia Board of Education is clearly responsible for providing residential educational services to plaintiff pursuant to requirements of The Education for All Handicapped Children Act, 20

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U.S.C. § 1412(6), and EHA regulations, Reg. 121a.302, Section 504 of the Rehabilitation Act and Reg. 84.33(c)(3) promulgated thereunder, and the court's order in *Mills v. Board of Education of D.C.*, 348 F. Supp. 866 (D. D.C. 1972).

Where, on the one hand, continuance of a neglect proceeding to place plaintiff in permanent custody of Department of Human Resources would have a devastating impact on plaintiff's course of treatment and, on the other, plaintiff would be excluded from residential placement for lack of funds, plaintiff has properly invoked his federal rights to appropriate educational placement under the Education of All Handicapped Children Act.

## MEMORANDUM AND ORDER

Plaintiff Ty Wesley North[1] is a multiply handicapped sixteen-year old boy who is diagnosed as being epileptic with grand mal, petit mal, and drop seizures, emotionally disturbed, and learning disabled. On November 30, 1977, an evaluation and assessment of the plaintiff for purposes of determining an appropriate educational placement for him was conducted pursuant to federal and District of Columbia law by a placement committee of the Sharpe Health School functioning under the auspices of the defendants. At that time the committee recommended that the appropriate placement would be a residential treatment facility which would provide medical supervision, special education, and psychological support.[2] However, defendants took no steps to arrange such a placement for plaintiff until ordered to do so three months later, on February 23, 1978, by a hearing officer, sitting pursuant to the requirements of *Mills v. Board of Education of D.C.*, 348 F. Supp. 866 (D. D.C. 1972). Ruling that the plaintiff was being denied an appropriate educational placement because of the failure of defendants to act, the hearing officer ordered them to provide a placement that was consistent with their own recommendations and reports. In April, 1978, plaintiff began school at the Elwyn Institute in Pennsylvania, a private residential treatment facility which contracts with defendants to provide special education to District of Columbia children sent there.

Problems with this placement began to develop in June of that year. Ty North was not cooperating with the staff or the students and, additionally, he was experiencing difficulties with taking his necessary medication. Early in December, his parents were notified by the Elwyn Institute that he was to be discharged because the school could no longer deal with his emotional and other problems. Counsel for plaintiffs thereupon requested that defendants provide Ty with an emergency residential placement because his parents, too, were unable to cope with his medical and emotional problems. However, defendants, for various reasons, effected no alternate placement.[3]

On December 21, officials of Elwyn attempted to leave Ty with his parents, but when the Norths refused to accept him, he was returned to Elwyn. A second attempt to deliver Ty to his parents was initiated on January 8, 1979. This time, after yet another refusal by his parents, Ty was left at an office of the Department of Human Resources from where he was taken to the Area C Mental Health Unit at D.C. General Hospital.

On January 11, plaintiff and his parents initiated this action seeking declaratory and injunctive relief under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; the decision of Judge Waddy in *Mills*, *supra*; the Rules of the D.C. Board of Education, D.C. Register, Oct. 7, 1977, § 457, p. 2815-17; and the Fifth Amendment to the U.S. Constitution. Plaintiffs' request for a temporary restraining order was denied on January 15, 1979, on account of their failure to demonstrate irreparable injury. Plaintiff had by that time been moved to the Dominion Psychiatric Treatment Center in Falls Church, Virginia, a residential treatment facility offering therapy and education as well as attention to plaintiff's medical problems, and he was therefore not in immediate jeopardy. By order of Judge Joseph M. F. Ryan, Jr., of the D.C. Superior Court, sitting in the Juvenile Branch, plaintiff will remain at Dominion pending the outcome of a neglect action initiated by the Corporation Counsel in that Branch after the action here had been filed. The neglect proceeding has been postponed several times, apparently by agreement of the parties, to await the outcome of this suit, and it is presently set to be heard late in April.

I.

The issue in this Court is whether plaintiff needs to be placed in a residential facility and, if so, whether the D.C. Board of Education is responsible for providing that placement. None of the evidence in this case indicates, and indeed none of the parties asserts, that plaintiff does not need a residential placement. All of his psychological evaluations, as well as the determination made by the Board's hearing examiner, demonstrate that plaintiff has severe emotional and educational problems which can appropriately be dealt with only by intensive treatment in a residential setting.

The defendants contend, however, that while plaintiff's *emotional* difficulties demand this residential treatment, his *educational* needs can be met by attendance at the Powell Annex, a special education day program. They argue further that plaintiff's emotional well-being is the responsibility of the D.C. Department of Human Resources and that they, the Board of Education, can adequately discharge their duty to provide for his education by a less restrictive placement,[4] that is, by a day program. Therefore, defendants suggest, the appropriate procedure to meet plaintiff's admitted need for residential care is to pursue the neglect action initiated by the Corporation Counsel in the Superior Court, adjudicate his parents as neglectful, and place Ty in the custody of the Department of Human Resources.

It is clear that under federal law defendants bear the responsibility for providing plaintiff with residential placement where such placement is appropriate. The Education for

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All Handicapped Children Act, specifically 20 U.S.C. § 1412(6), vests them with responsibility for administering all educational programs for handicapped children within their jurisdiction, and the regulations, 45 C.F.R. 121a.302, specify that when residential care is required, it must be at no cost to the parents. Defendants' obligations in that regard are also codified in the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and the regulations promulgated thereunder, 45 C.F.R. 84 *et seq.*, which provide many of the same substantive and procedural rights as are found in the Education for All Handicapped Children Act. Once again, defendants' responsibility for providing residential placement is clear, for Section 84.33(c)(3) of 45 C.F.R. provides that

> If placement in a public or private residential program is necessary to provide a free and appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

*See also*, and especially the comment in 45 C.F.R. 121a.600, the regulation which implements Section 1412(6), which states

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.

These statutory and regulatory provisions, coupled with Judge Waddy's order to the D.C. Board of Education in *Mills*, *supra*, 348 F. Supp. at 878, that no child shall be excluded from a regular public school assignment unless such child is provided "adequate alternative educational services suited to the child's needs, which may include special education or tuition grants," clearly place responsibility for providing residential educational services to plaintiff on these defendants.[5]

## II

Defendants vigorously argue that plaintiff's problems are emotional, social, and otherwise non-educational, and that they should not be saddled with the responsibility of providing him with living arrangements not strictly of an educational nature. That, it is said, is the responsibility of the parents, and if the parents are unable or unwilling to discharge that responsibility, it vests in the social service agencies, not the Board of Education. Specifically, defendants suggest that resort be had to such alternate commitment schemes as those set forth in D.C. Code § 16-2301 *et seq.*, pertaining to children who are delinquent, neglected, or in need of supervision.

As indicated *supra*, under applicable laws and regulations the educational authorities have the clear duty to place a school-age child in a residential facility when that is necessary in order to provide him with the appropriate educational program. Notwithstanding these relatively unambiguous statutory and regulatory directives, the Court is reluctant to hold flatly that in every situation where emotional or other medical problems impact upon educational needs, the normal *parens patriae* role of the local authorities is displaced by federal law. As a general proposition, it would seem preferable to have issues of the type involved in this case attended to by social service agencies rather than by the school authorities, and litigated in state and local tribunals rather than in the federal courts. It may well be that these philosophical considerations of federalism and of social service expertise are overcome by the explicit statutory and regulatory provisions cited above, and that therefore these issues must always be shifted to the federal forum. However, for the reasons discussed below, it is not necessary in this case to decide these ultimate issues because on the specific facts here the District of Columbia neglect proceeding is inappropriate, and the federal statutes must therefore be invoked.

## III

Dr. Martin Stein, the medical director of the Dominion Center where plaintiff is temporarily placed, testified that a neglect proceeding in Superior Court would itself have a devastating impact on plaintiff's course of treatment. Ty's emotional problems have been significantly exacerbated by his perception that he has been abandoned by his parents, and the unrefuted medical opinion is that the stigma of having his parents adjudicated neglectful and unwilling to care for him would seriously cripple efforts to deal with his problems and to reunite his family. Inasmuch as the price of proceeding through the local procedures is thus unacceptably high, the only available alternatives are placement and financial support for that placement through plaintiff's parents or through the Board of Education.

The daily cost of keeping plaintiff at his present temporary placement is approximately $160. At present, some of that cost is covered by the parents' insurance and the remainder is borne by the Department of Human Resources. Unless plaintiff is adjudicated neglected and placed in the permanent custody of the Department of Human Resources, that agency will not, and it claims that under federal matching grant legislation it cannot, continue its portion of the payments. Thus, defendants would have plaintiffs face the Hobson's choice of having Ty released from the Dominion Center for lack of funds,[6] or suffer the emotional damage that Dr. Stein

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testified will accompany a neglect finding.[7] Either choice would cause irreparable injury to plaintiffs.

It may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them. Since, as noted *supra*, relegation of the plaintiffs to the purely social recourse, *i.e.*, the neglect procedure, is fraught with peril to the child and the family, use of the federal educational laws and placement pursuant to those laws is the only legally available alternative and is clearly required.

For these reasons, the Court finds that plaintiff's federal rights to appropriate educational placement are properly invoked, and that the Court should exercise its legal and equitable jurisdiction, and it will therefore grant the relief requested by plaintiffs.[8]

IV

As pointed out above, the emotional needs of this plaintiff are closely interwoven with his educational needs. It is unfortunate that the two agencies of the District having responsibility for plaintiff's care are seeking to shift the responsibility to each other—the Board of Education claiming that plaintiff's problems are emotional, and the Department of Human Resources asserting that they are educational and further that it will not undertake to tend to his treatment without a formal finding that the parents have neglected him. It may be that the fault lies with the antiquated state of the District of Columbia laws; but in any event, it is unfortunate that the assistance of this Court had to be invoked under federal statutes to resolve what essentially are internal bureaucratic disputes. Since this assistance has been sought, the Court must adjudicate plaintiff's rights and thereby resolve that which the several District of Columbia agencies have been unable or unwilling to decide among themselves; that, is, who among them shall pay for plaintiff's residential treatment—treatment which all affected departments appear to agree is both necessary and a responsibility of the District of Columbia government.

The Court finds that plaintiff is about to suffer irreparable injury, that he has demonstrated a likelihood of success on the merits of this litigation, and that there is no countervailing burden or injury to either the defendants or the public interest. Accordingly, a preliminary injunction will issue.

Upon consideration of plaintiffs' motion for a preliminary injunction, the opposition papers filed by defendants, the hearings held, and the entire record, it is this 9th day of April, 1979 hereby

DECLARED That defendants have the legal responsibility to provide plaintiff Ty Wesley North with an appropriate residential academic program under 20 U.S.C. § 1401 *et seq.*, 29 U.S.C. § 701, and *Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C. 1972), and it is

ORDERED That pending further order of the Court defendants are hereby restrained from further denying plaintiff Ty Wesley North a free appropriate education in violation of 20 U.S.C. § 1401 *et seq.*, 29 U.S.C. § 701 *et seq.*, and *Mills v. Board of Education*, *supra*, by refusing to place him in a residential academic program with necessary psychatric, psychological and medical support and supervision; and it is further

ORDERED That until further order of the Court defendants, or their appropriate agents, shall undertake the responsibility, financial and otherwise, for the placement of plaintiff Ty North at the Dominion Psychiatric Treatment Center, and it is further

ORDERED That this Order is contingent upon the posting by plaintiffs of a bond in the amount of $500.00.

---

[1] Ty Wesley North will generally be referred to hereinafter as the plaintiff, although the action was brought both on his behalf and on behalf of his parents.

[2] Residential treatment may be defined as a twenty-four hour setting providing shelter, food, special education, and related services. It is distinguished from a day care program which typically operates only from 9:00 a.m. to 3:00 p.m.

[3] The saga of the unsuccessful efforts of plaintiffs' counsel to secure action from the District of Columbia agencies is long and tortured. All during December, counsel contacted various officials of the D.C. Board of Education and the D.C. Department of Human Resources, each of whom disclaimed responsibility and failed to achieve an appropriate placement.

[4] Both the Education for All Handicapped Children Act and the *Mills* decision contemplate that the children be educated in the "least restrictive environment." 20 U.S.C. § 1412(5)(B); *Mills v. Board of Education*, *supra*, 348 F. Supp. at 880; *Stuart v. Nappi*, 443 F. Supp. 1235, 1242 (D. Conn. 1978).

[5] For a recent instance where the D.C. Board of Education was ordered to provide a residential placement for a child pursuant to the Education for All Handicapped Children Act and the *Mills* decision, *see Hudson v. Board of Education of D.C.*, C.A. 78-2263, Memorandum Order of Judge June Green, dated March 12, 1979.

[6] Ty's parents are apparently unable to pay the costs.

[7] The suggestion of neglect is particularly ironic considering that a portion of Ty's expenses are now being covered by his parents' insurance.

[8] Defendants claim that plaintiffs should be prohibited from pursuing the action because they have failed to exhaust their administrative remedies. In the first place, it is unclear to what remedies defendants refer since an administrative determination was previously made that plaintiff needs residential treatment. The issue in dispute is not whether he needs such treatment but rather who should provide it. A further review of plaintiff's needs seems superfluous in light of the ample record of psychological, emotional, and educational evaluations. Moreover, there was no practical opportunity

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Footnote 8 (Continued)
for pursuing and exhausting administrative remedies. Ty North arrived in the District of Columbia from Elwyn on January 8, 1979. He was then placed in Area C Mental Health Unit, and further pursuit of administrative procedures—which had proved fruitless for several months—would have entailed his continued confinement in that unsuitable facility. It may be worth noting in this connection that in the course of plaintiffs' efforts to secure action from the defendants, the latter appear to have committed wholesale violations of plaintiff's procedural rights. *See, e.g.*, 20 U.S.C. § 1415(b)(1)(c); 45 C.F.R. 121a.505; 45 C.F.R. 121a.347; 45 C.F.R. 84.36; *Mills v. Board of Education, supra*, 348 F. Supp. at 880.

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REV. & MRS. CARL H. KRUELLE,
Appellees

v.

NEW CASTLE COUNTY SCHOOL DISTRICT; DR. CARROLL W. BIGGS, Superintendent of New Castle County School District; DR. KENNETH C. MADDEN, Superintendent of the Division of Public Instruction; MRS. PATRICIA C. SCHRAMM, Secretary of the Division of Social Services; MR. WARREN J. GEHRT, Superintendent of the Division of Mental Retardation; DELAWARE STATE BOARD OF EDUCATION

Dr. Carroll W. Biggs, Superintendent of New Castle County School District,
Appellant in 80-1875 and 80-2063

State Board of Education and Dr. Kenneth C. Madden, State Superintendent of Public Instruction,
Appellants in 80-1876

Dr. Kenneth C. Madden, Superintendent of Public Instruction, and the State Board of Education,
Appellants in 80-2064

Nos. 80-1875, 80-1876, 80-2063, 80-2064

United States Court of Appeals for the Third Circuit

Appeal from the United States District Court for the District of Delaware

Argued January 19, 1981 Filed April 1, 1981

Before ADAMS, VAN DUSEN and GIBBONS, Circuit Judges

Counsel for New Castle County School District and Dr. Carroll W. Biggs: Edward M. McNally (Argued), Clark W. Furlow, Morris James, Hitchens & Williams, Wilmington, DE

Counsel for Dr. Kenneth C. Madden and State Board of Education: Roger A. Akin (Argued), Deputy Attorney General, Department of Justice, Wilmington, DE

Counsel for the Developmental Disabilities Advocacy Network of Pennsylvania: Catherine Carr, Janet F. Stotland (Argued), Education Law Center, Inc., Philadelphia, PA

Brian J. Hartman, Amicus Curiae of Developmental Disabilities Advocacy Network System for the State of Delaware

Appeal by State and local education agencies of lower court decision, 3 EHLR 552:141, finding that program provided by LEA was not a free appropriate public education and directing the SEA to provide child with full-time residential program. On appeal, appellants urge that district court erred in determining that child is entitled to residential placement under EHA and also erred in holding SEA responsible for providing child with an appropriate education.

*HELD*, lower court decision affirmed. Where, as here, all parties concede that child needs full-time assistance from the SEA beyond that available in any school program, it should not be assumed that conforming to the standard school day that suffices for nonhandicapped children will fulfill school's obligations to handicapped child. In considering whether full-time placement may be necessary for educational purposes, or for medical, social, or emotional problems that are segregable from the learning process, the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning. The language and legislative history of EHA do not entertain the possibility that some children may be untrainable; to the contrary, schools are required to provide a comprehensive range of services to accommodate a handicapped child's educational needs, regardless of financial and administrative burdens, and, if necessary, to resort to residential placement. Accordingly, the district court's order carried out the implications of an undeniably broad statutory intent. In addition, in view of a general, Congressional perception of the

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State's primary responsibility to provide a publicly supported education for all children and a specific intent to centralize this responsibility, the lower court did not err in assigning responsibility to the SEA. In conformity with both Federal and State statutes, the lower court properly directed the SEA to insure that a proper evaluation of the child's needs be undertaken and an appropriate plan be implemented, leaving to State officials resolution of any interagency conflicts or delegation of duties from State to regional and local levels.

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ADAMS, Circuit Judge

OPINION OF THE COURT

This case presents two issues arising under the Education for All Handicapped Children Act of 1975, P.L. 94-142, 20 U.S.C. §§ 1401 *et seq*. (Education Act), that are of first impression for this Court. First, did the district court err in determining that Paul Kruelle is entitled to residential placement under the Education Act? Second, did the district court err in holding the Delaware State Board of Education responsible for providing Paul with an appropriate education in conformity with the Act?

I.

Appellant is profoundly retarded and is also afflicted with cerebral palsy. At age thirteen he has the social skills of a six month old child and his I.Q. is well below thirty. As found by the district court, "he cannot walk, dress himself, or eat unaided. He is not toilet trained. He does not speak, and his receptive communication level is extremely low. In addition to his physical problems, he has had a history of emotional problems which result in choking and self-induced vomiting when experiencing stress." *Kruelle v. Biggs*, 489 F. Supp. 169, 172 (D DE 1980).

The chronicle of Paul's educational placements begins in 1973, when he entered the Barber Center Preschool Program in Pennsylvania,[1] where the Kruelle family then resided. Paul next spent three years in the public school system in a mixed class with the trainable mentally retarded. By 1977 Paul's behavior had significantly deteriorated. He was vomiting food in school and having frequent temper tantrums. That summer Paul received in-home instruction to compensate for his rejection of the school environment.

In September 1977 at the behest of the public educational authorities Paul was placed in the private day program at the Barber Center. Admission was based on the local school agencies' certification that "an appropriate education for this child cannot be met in a special education program operated either by the school district or Intermediate Unit" in Pennsylvania. Despite initial improvement, by early 1978 Paul again manifested the vomiting and choking that apparently is caused by emotional stress. Because of the severity and increased frequency of the vomiting, both the school authorities and Paul's parents concluded that 24-hour residential placement was needed.[2]

After a short period in respite care,[3] Paul was admitted in June 1978 to the Barber Center's New Community Living Arrangement Program for multiply-handicapped children. Although not a "residential" placement in the sense of having the living environment and school facilities on the same premises, this combination school program and group home did provide around-the-clock training by skilled caretakers. The local and state educational agencies, Department of Public Welfare and Social Security Administration provided funding for the program. Most importantly, except for a brief hospital stay for pneumonia, Paul appears to have adjusted well to this joint CLA residence school program.

The Kruelle family then moved to Delaware. Paul was immediately enrolled in the Meadowood School and placed in respite care at the home of Mrs. Albanese. Mrs. Albanese had extensive experience in the care and training of handicapped children. Although the teachers at Meadowood indicated that Paul made observable progress at the school and Mrs. Albanese noted some improvement from her continuation of Paul's day time training, after two weeks the Kruelles withdrew Paul from Meadowood. Having objected from the start to the lack of a residential placement in Delaware, as well as to Paul's assignment to a mixed class of trainable mentally retarded, which had previously failed, the Kruelles next began, through the administrative process,[3a] an unsuccessful quest for a residential program.

Parents or guardians challenging a child's educational placement are offered an impartial hearing under the Education Act. 20 U.S.C. § 1415(b)(2). In states such as Delaware, where the hearing is conducted by a local or an intermediate educational unit, the party may appeal to the state educational agency. 20 U.S.C. § 1415(c). Both the district hearing officer and the state-level review officer determined that the individual educational program (IEP) proposed by the Meadowood staff was "appropriate" within the meaning of the Education Act. The district hearing officer found that

[1] The Dr. Gertrude A. Barber Center, Inc. of Erie, Pa. is a private licensed school for 600 mentally retarded and handicapped persons, operated under the aegis of the Northwestern School District and funded, in Paul's case, by that school district, the Northwest Tri-County Intermediate Unit, the Penn. Dept. of Public Welfare and the SSI division of the Social Security Administration. *See* Amended Complaint, 4a, 81a.

[2] Defendants' Joint Appendix, 77a, 86a, 87a, 257-58a.

[3] Respite care is full time care that involves much more than custodial care or babysitting. Although simple assistance in eating and dressing is provided, respite care comprehends reinforcement of skills taught during the school day.

[3a] The Education Act sets up a procedural system whereby parents first participate with educational authorities in the formulation of an individualized educational program (IEP) for their child and are later permitted to challenge the IEP via administrative review. *See* 20 U.S.C. § 1415(b), (c).

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residential placement was "too restrictive," while the state review officer asserted that the full-time services sought "were more in the nature of parenting than education." The Kruelle's request for Paul's placement in a residential setting was therefore denied.

In October, 1979, Paul's parents, *pro se*, sought review of the administrative decision by filing a civil suit in district court.[4] The multiple defendants included the local New Castle County School District (NCCSD), the supervisory State Board of Education, the Superintendent of the Division of Public Instruction, Dr. Kenneth Madden, as well as the state authorities with general jurisdiction over programs for handicapped children in Delaware — the Division of Health and Social Services and the Division of Mental Retardation. Both sides requested the opportunity to present additional evidence at the court hearing.

Dr. Angert, who had previously served as a consultant for the NCCSD but who had no firsthand knowledge of Paul's experience at Meadowood, was the principal witness for the Kruelles.[5] Although he generally was inclined against residential placement, he recommended such a program for Paul, because of Paul's need for a consistent environment. Dr. Angert believed, in light of Paul's history, that "inconsistency of approach, environment or caretakers typically led to stress and self-destructive behaviors such as vomiting." Accordingly, he urged a 24 hour placement "with programming by people who know how to do it" in order to maximize Paul's chances of learning. *Kruelle v. Biggs*, 489 F. Supp. at 173. The defendant school and state authorities continued to maintain that the day program at Meadowood satisfied Paul's educational needs, and any necessity for residential placement arose from social and emotional problems clearly beyond the competency and responsibility of school officials.

Much like Dr. Angert, the district court concluded that Paul required a greater degree of consistency than many other profoundly retarded children. Specifically, it held that the present educational program provided by the NCCSD was not a free appropriate public education within the meaning of the Act. Then, in a supplemental order, the district court directed the State Education Board to provide Paul with a full-time residential program. The local and state school authorities now appeal this decision challenging both the residential placement and the imposition of the order against the state agency as erroneous interpretations of the requirements of the Education Act. We affirm.

[4] 20 U.S.C. § 1415(e)(2) provides that any party aggrieved by an agency decision shall have the right to bring a civil action in any state court of competent jurisdiction or in a district court. The court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

[5] When plaintiff earlier appealed the hearing officer's ruling to a state review level, they sought to supplement the record with Dr. Angert's testimony. The state reviewing officer denied plaintiff's request to reopen the record for an additional hearing, and the district court held that this was not an abuse of discretion. *See Kruelle v. Biggs*, 489 F. Supp. at 171.

## II.

The Education Act embodies a strong federal policy to provide an appropriate education for every handicapped child. Three interrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a public-supported equal educational opportunity which it perceived to be mandated by *Brown v. Board of Education*,[6] and explicitly guaranteed with respect to the handicapped by two seminal federal cases, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*[7] and *Mills v. Board of Education*.[8] Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens.[9] Third, Congress acknowledged the need for an expanded federal fiscal role to aid state compliance with the court decisions and to assure protection for the rights of handicapped children.[10] A cost benefit philosophy supported these interlocking goals. Instead of saddling public agencies and taxpayers with the enormous expenditures necessary to maintain the handicapped as lifelong dependents in a minimally acceptable institutionalized existence, Congress reasoned that the early injection of federal money and provision of educational services would remove this burden by creating productive citizens.[11]

To a large extent the Education Act establishes only procedural guidelines and safeguards, leaving school officials and parents relatively unconstrained in creating individualized educational programs (IEPs) for handicapped children. Recognizing the broad range of special needs presented by handicapped children, the lack of agreement within the medical and educational professions on what constitutes an appropriate education, and the tradition of state and local control over educational matters, Congress refrained from

[6] 347 U.S. 483 (1954). "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be available to all on equal terms." 347 U.S. at 493 *cited in* S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1430 (legislative history of Education Act P.L. 94-142).

[7] 334 F. Supp. 1257 (E.D. Pa. 1971), *modified* 343 F. Supp. 279 (1972).

[8] 348 F. Supp. 866 (D DC 1972). The Supreme Court has never been presented with the merits of the due process and equal protection issues raised in these two cases, largely because of the passage of the Education Act.

[9] *See* S. Rep. No. 168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1433. *See also PARC v. Pennsylvania*, 343 F. Supp. 279, 296 n.50 (President's Committee on Mental Retardation notes that three-quarters of nation's retarded people could become self-supporting if given proper training early enough).

[10] *See* S. Rep. No. 168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News 1431.

[11] *See* S. Rep. No. 168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News 1434.

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mandating overly detailed programs.[12] The Education Act, however, is not silent on what qualifies as a free appropriate public education (FAPE). In fact, the 1975 statute and regulations promulgated thereunder, for the first time, give definitional content to the term "appropriate education" and its component parts, "special education" and related services."[13]

Theoretically, the scope and details of an appropriate education which the local educational agencies are obligated to provide as a condition to receiving federal grants under the statute, are left primarily to state definition.[14] But the term "special education" is given specific content:

> The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. § 1401(16).

Similarly, "related services" is extensively defined:

> The term "related services" means transportation, and such developmental corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17).

Moreover, the regulations promulgated under the Act explicitly contemplate residential placement:

> If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.
>
> Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

45 C.F.R. § 121a.302.

In light of these provisions, a court is not with guidance in determining whether a residential setting is consistent with the Education Act's purpose and directives. And most courts confronted with the question whether residential placement is necessary to meet the goals of an individual education plan have answered in the affirmative.[15]

Another salient feature of the Education Act, for our purposes, is the congressional rejection of court deference to agency determinations. The statute contemplates a *de novo* review role by the district courts, including the hearing of additional evidence and an independent decision by the district courts based on the preponderance of the evidence. 20 U.S.C. § 1415(e)(2).[16] Thus, in evaluating the ruling by the district court here, what is critical is not whether the judge reversed the conclusions of the state agencies, but whether he properly applied the preponderance of the evidence standard prescribed by Congress.[17]

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[12] *See* 20 U.S.C. §§ 1414, 1415. Note: Enforcing the Right to An "Appropriate" Education: The Education for all Handicapped Children Act of 1975, 92 Harv. L. Rev. 1076, 1108.09 (1979).

[13] Prior to the 1975 Act, which was intended to bring to fruition the increased involvement of the federal government in the control and funding of education embodied in the 1974 amendments to the Education of the Handicapped Act P.L. 93-380 the federal government had primarily disbursed funds for research to catalyze state activities. *See Lora v. Bd. of Educ. of City of New York*, 456 F. Supp. 1121, 1224 (E.D. NY 1978), *aff'd in part and vac. and remanded in part*, 623 F.2d 248 (2d Cir. 1980).

[14] 20 U.S.C. § 1401(18) reads:

The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

[15] *See Capello v. District of Columbia Bd. of Ed.*, No. 79-1106, 3 Educ. Handicapped L. Rep. [hereinafter EHLR] 551:500 (D DC Jan. 23, 1980); *Matthews v. Campbell*, No. 78-0879-R, 3 EHLR 551:264 (E.D. VA July 16, 1979); *Ladson v. Bd. of Ed. of the Dist. of Columbia*, No. 78-2263, 3 EHLR 551:188 (D DC. March 12, 1979); *North v. Dist. of Columbia Bd. of Ed.*, 421 F. Supp. 136, (D DC 1979).

[16] *See Ladson v. Board of Educ. of Dist. of Columbia Govt.*, No. 78-2263, 3 EHLR 551:188, 189 (D DC March 12, 1979); S. Rep. No. 455 (Conf. Rep.) 94th Cong., 1st Sess. 50, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1503 (courts to examine evidence independently).

[17] As noted in *Rowley v. Board of Educ. of Hendrick Hudson Central School District* "This is a different standard of proof than that which originally had been proposed. The initial bill passed by the House had provided that the determination of the state agency would be "conclusive in any court of the United States if supported by substantial evidence . . ." H.R. 7217, 94th Cong., 1st Sess., *reprinted in* H.R. Rep. No. 332, 94th Cong., 1st Sess. 56 (1975).

*See also Laura M. v. Special School District No. 1*, 3 EHLR 552:152 (D.C. MN Jan. 21, 1980) (no reference in statute to findings of the administrative agency, and no authorization to accord those findings any social deference).

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III.

Significantly, all parties concede that Paul needs full-time assistance from the state of Delaware beyond that available in any day school program.[18] It is also uncontroverted that the Education Act specifically provides for residential placement in certain instances. *See* 20 U.S.C. §§ 1401(16), 1413(a)(4)(B); 45 C.F.R. § 1212.302. The question, then, is whether the trial judge correctly construed the Education Act as requiring more continuous supervision for Paul than he was receiving under the Meadowood Program in order to meet the standard of a free appropriate education.[19]

Based on our careful review of the record, we cannot find that the district court erred in holding that the six-hour day provided by the Meadowood program was an inappropriate education given the terms of the Act. The trial judge's conclusion that Paul required more continuous care is supported generally by the logic of the decision in *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), and more specifically by analogous case law emerging in other federal courts.[20] Just as in *Battle* we held that the *per se* application of the 180 school-day rule accepted as appropriate for the nonhandicapped cannot be presumed to satisfy the unique needs of handicapped children, here the school authorities are incorrect to assume that conforming to the six-hour day that suffices for nonhandicapped children will similarly fulfill their obligations with respect to Paul.

The school district seeks to avoid the thrust of *Battle* by centering its challenge on the proposition that here the residential placement is required only for reasons of medical and domiciliary care, not for educational purposes. But as the *Battle* opinion explained, the concept of education is necessarily broad with respect to persons such as Paul. "Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point," 629 F.2d 269, 275. And Congress was clearly aware of children with Paul's needs and was quite conscious of the foundational nature of their education. The Education Act unqualifiedly provides for a free appropriate education for all handicapped children, "regardless of the severity of their handicap," 20 U.S.C. § 1412(2)(C). It explicitly directs that all children not presently receiving an education and those "with the most severe handicaps who are receiving an inadequate education," 20 U.S.C. § 1412(3), be given priority.[21]

Analysis must focus, then, on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process. This Court is not the first to attempt to distinguish between residential placement that is a necessary predicate for learning and the provision of services that are unrelated to learning skills. One of the early cases to grapple with this issue, *North v. Dist. of Columbia Board of Education*, 471 F. Supp. 136 (D DC 1979), actually collapsed the distinction by declaring the impossibility of separating emotional and educational needs in complex cases. *North* is almost indistinguishable on the facts from the present case.[22] It also involved the same issue: whether placement was required for emotional problems and was therefore the responsibility of the parents or social service agencies or whether full-time placement was a necessary ingredient for learning. The *North* court enjoined the school board from denying a sixteen-year old multiply-handicapped epileptic free placement in a residential academic program because it found the social, emotional, medical and educational problems to be so intertwined "that realistically it is not possible for the court to perform the Solomon-like task of separating them." 471 F. Supp. at 141. However, as later cases demonstrate, the claimed inextricability of medical and educational grounds for certain services does not signal court abdication from decisionmaking in difficult matters. Rather, the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning.

A recent example is *Tatro v. State of Texas*, 625 F.2d 557 (5th Cir. 1980), which centered on whether the provision of a "clean intermittent catheterization" (CIC) procedure was a related service within the meaning of the Education Act. The court's holding that the CIC fell within the statutory definition of related services was based on the proposition that without CIC the child could not be present in the classroom at all and thus could not benefit from the special education to which she is entitled. 625 F.2d at 562. Analogously, here, consistency of programming and environment is critical to Paul's ability to learn, for the absence of a structured environment contributes to Paul's choking and vomiting which, in turn, interferes fundamentally with his ability to learn.

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[18] NCCSD Appellants' Brief at 14, 21 ("Paul Kruelle is unquestionably entitled to comprehensive assistance from the State of Delaware, if not from the NCCSD.")

[19] The holding in the court's opinion was limited to the determination that the program Paul was receiving at Meadowood was not a FAPE within the meaning of the Act. The court indicated "it would appear that full-time care is necessary in order to allow Paul to learn." Later in a supplemental order, the court directed that residential placement be provided for six months.

[20] *See Capello v. District of Columbia Board of Education*, No. 79-1106, 3 EHLR 551:500 (D DC Jan. 23, 1980); *Matthews v. Campbell*, No. 78-0879-R, 3 EHLR 551:264 (E.D. VA July 16, 1979); *Ladson v. Bd. of Educ. of the Dist. of Columbia Gov't.*, No. 78-2263, 3 EHLR 551:188 (D DC March 12, 1979).

[21] This directive may well have been intended to offset any budgetary incentives to deal initially with the least afflicted and to provide for the least expensive services first, since state receipt of money under the Act is conditioned on the number of handicapped children served regardless of their need. *See* 20 U.S.C. § 1411.

[22] *North* differs only insofar as it arose on a preliminary injunction. The plaintiffs potentially faced the unfortunate choice of having their child released from the residential center for lack of funds or submitting to a neglect proceeding so that their child could be placed in the permanent custody of the Department of Human Resources, which would then consent to fund the residential placement. *See North v. District of Columbia Bd. of Educ.*, 417 F. Supp. 136, 141 (1979).

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Although *Tatro* addressed whether certain life support services were encompassed within the statutory definition of "related services," whereas the present case asks whether residential placement is encompassed within the statutory heading of "special education,"[23] they raise similar concerns. From one perspective, there is an inner dynamic to the *Tatro* analysis which is troublesome: ultimately any life support system or medical aid can be construed as related to a child's ability to learn. But this would ignore, as the court in *Tatro* pointed out, the very limitations the legislation provides. The statutory language requires courts to assess the link between the supportive service or educational placement and the child's learning needs. Thus, according to *Tatro*, inasmuch as the statute comprehends only services "as may be required to assist a handicapped child to benefit from special education," § 1401(17), "a life support service would not be a related service if it did not have to be provided during school hours, but instead could be performed at some other time," 625 F.2d at 563. The relevant question in the present case is whether residential placement is part and parcel of a "specially designed instruction . . . to meet the unique needs of a handicapped child," in conformity with § 1401(16). And we cannot conclude that the district judge misapplied the statutory standard in determining that "because of his combination of physical and mental handicaps, [Paul] requires a greater degree of consistency of programming than many other profoundly retarded children" and that "it would appear that full-time care is necessary in order to allow Paul to learn." Indeed, it would be difficult to conceive of a more apt case than Paul's for which the unique needs of a child required residential placement.

Furthermore, this interpretation of the statute's requirements parallels the decisions of other courts. For example, in *Ladson v. Board of Education of the Dist. of Columbia*, No. 78-2263, 3 EHLR 551:188 (D DC March 12, 1979), the teacher of an eleven year old who suffered from Down's syndrome and who had the mental capacity of an 18 month old child, recommended residential placement to prevent regression in the child's learning. Although the Board of Education and subsequently the agency hearing officer rejected the need for residential placement, the district court concluded that the child required 24-hour a day care in order to meet the goals of her individualized education program.[24]

Of course, before ordering residential placement, a court should weigh the mainstreaming policy embodied in the Education Act which encourages placement of the child in the least restrictive environment.[25] The district judge here, however, carefully undertook such a calculation. He noted that in the past attempts to provide in-home care and after-school instruction had been singularly unsuccessful; all had occasioned regression for Paul. And as the trial judge remarked in *DeWalt v. Burkholder*, No. 80-0014-A, 3 EHLR 551:500 (E.D. VA March 13, 1980), once a court concludes that residential placement is the only realistic option for learning improvement, the question of "least restrictive" environment is also resolved. "Only when alternatives exist must the court reach the issue of which is the least restrictive." 3 EHLR 551 at 553. If day school cannot provide an appropriate education it is, by definition, not a possible alternative.

Admittedly, the unequivocal congressional directive to provide an appropriate education for all children regardless of the severity of the handicap, 20 U.S.C. § 1412(2)(C), places a substantial burden on states in certain instances. The language and the legislative history of the Act simply do not entertain the possibility that some children may be untrainable. Consequently, the present situation is distinguishable from cases such as *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), arising under the Rehabilitation Act of 1973, for the Rehabilitation Act stops short of mandating "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals." 442 U.S. at 410. In *Davis* a handicapped person with a serious hearing disability challenged the denial of her admission to a nursing program as a violation of the Rehabilitation Act. That legislation prohibits discrimination against an otherwise qualified handicapped individual in a federally funded program solely by reason of his handicap, but does not require more than evenhanded treatment of handicapped and nonhandicapped by state agencies. As the court explained, "neither the language, purpose, nor history of § 504 [of the Rehabilitation Act] reveals an intent to impose an affirmative action obligation on all recipients of federal funds." 442 U.S. at 411. Thus, a court's interpretation of the regulations that required extensive modifications in the school program in order to accommodate a handicapped individual would constitute an unauthorized extension of the obligations imposed by that statute. The court, therefore, upheld the rejection by the state college of the applicant. Under the Education Act, in contradistinction, schools are required to provide a comprehensive range of services to accommodate a handicapped child's educational

[23] The parties have not directly posed the question whether residential placements fall under the rubric of "special education," § 1401(16), or "related services," § 1401(17). Inasmuch as the literal language of § 1401(16) includes "instruction in . . . institutions," we will treat such placement as an element of "special education." Admittedly, the regulations that specifically describe residential facilities are promulgated under § 1412(2)(B) and § 1413(a)(4)(B), which deal generally with both "special education" and "related services." It may be unwise, therefore, to locate residential placement prematurely within either statutory term.

[24] *See also Capello v. Dist. of Columbia Board of Education*, No. 79-1106, 3 EHLR 551:500 (D DC Jan. 23, 1980) (consistent residential education in calm setting essential to child's progress); *Matthews v. Campbell*, No. 78-0879-R, 3 EHLR 551:264 (E.D. VA July 16, 1979) (residential placement to ensure continuity necessary to obtain any improvement in self-sufficiency).

[25] 20 U.S.C. § 1412(5)(B) provides that in order to qualify for assistance a state must establish "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

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needs, regardless of financial and administrative burdens,[26] and if necessary, to resort to residential placement.[27] The district court's order, consequently, did not impose a duty beyond the contemplation of the Education Act; rather it carried out the implications of an undeniably broad statutory intent.[28]

IV.

Having determined that the district court did not err in holding that Paul's existing IEP was inadequate and in approving, at least temporarily, residential placement for Paul, we cannot say that the trial judge erred in assigning responsibility to the State Board of Education.[29] The Education Act unambiguously provides that:

> The state educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

20 U.S.C. § 1412(6).

Both a general, congressional perception of the state's primary responsibility to provide a publicly-supported education for all children[30] and a specific intent to centralize this responsibility underlie this explicit statutory mandate.

The legislative history indicates that the full committee considered the establishment of a single agency on which to focus responsibility for assuring the right to education of all handicapped children to be of paramount importance:

> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.

*See* S. Rep. No. 168, 94th Cong., 1st Sess. 24 *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1448.

The regulations implementing § 1412(6) of the Education Act, which essentially track the statutory language and specifically note the congressional desire for a central point of accountability, further underscore the intent to assure a single line of responsibility.[31] By placing the burden for coordinating efforts and financial arrangements for Paul's education on the State Board of Education, the trial judge was both reflecting legislative intent and appropriately observing the limits of his institutional role. Rather than rigidly pre-

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[26] *See Rowley v. Board of Educ. of the Hendrick Hudson Central School District*, 632 F.2d 945 (2d Cir. 1980) (free appropriate education requires sign language interpreter for particular deaf child involved).

[27] *See Matthews v. Campbell*, No. 78-0879-R, 3 EHLR 551:264 (E.D. VA July 16, 1979) (requiring residential placement despite serious misgivings about possibility of training plaintiff under any circumstances). Thus, while HEW regulations under the Rehabilitation Act did not require the type of "individual attention" services that would have been necessary for Mrs. Davis to complete nursing school, the statute and regulations involved here do require school authorities to provide residential placement to accommodate the handicapped. *Cf. Camenisch v. Univ. of Texas*, 616 F.2d 127 (5th Cir. 1980) cert. granted 49 U.S.L.W. 3332 (U.S. Nov. 3, 1980) (No. 80-317) (HEW regulations implementing Section 504 of Rehabilitation Act require provision of sign language interpreters).

[28] To the extent that *Southeastern Community College, supra*, means "only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precluded him from ever realizing the principal benefits of the training," *see Camenisch, supra* at 133, we do not require any more here. The evidence before us suggests that Paul potentially can realize benefits from residential placement.

[29] Noting that the order is directed against the State Board of Education, one amicus appellee has questioned the standing of the NCCSD. Insofar as the district court and the state board have as of yet declined specifically to classify Paul as a "rare and complex" case, the NCCSD is potentially liable for some of the costs of Paul's education.

[30] Congress, in enacting the Education Act, was actually under the belief that a constitutional right to an equal educational opportunity did exist. Although we acknowledge that the Supreme Court has subsequently failed to recognize a fundamental right to education, for purposes of triggering strict court scrutiny within the context of an ever-expanding state educational system, *see San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 39 (1973), the Court did not foreclose the possibility of a right to a minimally adequate education.

[31] 45 C.F.R. § 1212.600 provides:

Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:
  (1) That the requirements of this part are carried out; and
  (2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:
  (i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and
  (ii) Meets education standards of the State educational agency (including the requirements of this part)

(b) The State must comply with paragraph (a)(6) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

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scribe for the state how various local and state agencies should contribute to the provision of a free education for Paul, the federal court left such interactions to the discretion of the state officials involved.

Thus, the state, in contending that it functions solely as a supervisory agency and should not be responsible for coordinating efforts to develop an IEP for Paul or to insure funding, distorts the import of the district court's directive. The argument both mischaracterizes the nature of the accountability that the trial judge ascribed to the State Educational Agency and is contradicted by federal and state statutes and existing Delaware regulations.[32] The district court did not direct, as the state appellants suggest, that the State Board engage in the detailed development of a specific educational program for Paul. Instead, in conformity with both federal and state statutes, the State Board was to insure that a proper evaluation of Paul's needs be undertaken and an appropriate plan be implemented. *See* 20 U.S.C. § 1412(5), (6), (7); 14 Del. C. § 3120.[33] Resolution of any interagency conflicts or delegation of duties from state to regional and local levels was left, as it should have been, in the hands of the state officials.[34]

Appellant's final argument is that the Kruelles, and consequently the district court, invoked the incorrect statute in fashioning relief. Although the district court ruled that the complaint stated a cause of action solely under the Education Act,[35] and all parties assented to try the issues within the confines of that Act, the school and state officials now maintain, on the basis of a post-trial letter memorandum, that the proper statutory niche for the entitlement Paul seeks is the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 42 U.S.C. §§ 6000 *et seq*. (DDA).[36] As the NCCSD has openly conceded, what this case essentially involves is which agency should pay for Paul's institutionalization. Evidently, the parents' attempt to seek aid under the Education Act has triggered a "buck-passing" sequence: the local school district and state board claim that the DDA provides the appropriate funding source, the district court entered judgment under the Education Act against the State Board of Education; and the state agency disclaims responsibility and points back to the local education authorities.

But the determination that Paul's needs are covered by the Education Act renders unnecessary any decision whether they might also — perhaps even more comprehensively — be accommodated under the DDA.[37] The legislative history of the DDA indicates that it was intended to supplement, not to supplant, the Education Act. In fact, in explicating its purpose to help those "that have traditionally *fallen between* the cracks,"[38] the DDA proposes

> to assist in the provision of comprehensive services to persons with developmental disabilities, with priority to those persons whose needs cannot be covered or otherwise met under the Education for All Handicapped Children Act, the Rehabilitation Act of 1973, or other health, education or welfare programs.

42 U.S.C. § 6000(b)(2)(A).

Inasmuch as the Education Act encompasses only children between the ages of three and twenty-one, *see* 20 U.S.C. § 1411(a)(1)(A), this leaves a not-inconsiderable segment of the population to be provided for under the DDA. Thus, the two acts are neither duplicative nor do they impose an either-or choice on a recipient. If Paul's needs can be met by the Education Act, it was clearly not the intent of the DDA to remove the provision of these services.

Moreover, the educational authorities, in satisfying Paul's educational needs, are not narrowly confined to funds received under the Education Act. The legislative history of the Education Act reveals that it was not the desire of Congress to remove from the handicapped the burden occasioned by insufficient funding only to place it on local school boards. The committee pinpointed alternative federal funds available to the states to aid in fulfilling their responsibilities to the education of the handicapped.

> The federal sources which exist and which can assist in this process include approxi-

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[32] 14 Del. C. § 13110 requires:

(a) The State Board of Education is designated as a state agency that shall make rules and regulations to carry out this and other titles relative to the identification, evaluation, education, training and transportation of exceptional persons including specific definitions for the categories of units for exceptional children authorized for funding in § 1703 of this title.
(b) The rules promulgated by the State Board of Education shall provide the criteria by which identified handicapped persons, ages 4 through 20 inclusive, shall be assigned to a public school facility, or, if otherwise eligible for admission, to an institution of another state agency, or released for authorized placement in a private school or agency, pursuant to subchapter III of this chapter. (48 Del. Laws, c. 194, § 2; 14 Del. C. 1953, § 3102, 51 Del. Laws, c. 287, § 2; 61 Del. Laws, c. 190, § 7.)

[33] Reflecting the federal directive, 14 Del. C. § 3120 reads:

The State shall provide, in the school districts of the State, or in other state institutions and agencies or in special programs and private agencies as established or approved by the State Board of Education, that each handicapped person as defined in this chapter shall receive a free and adequate public education designed to meet his or her needs. The State Board of Education shall be the agency responsible for the implementation of this required provision. (61 Del. Laws, c. 190, § 7).

[34] The attorney for the State Board of Education and the State Superintendent also conceded, in a post-argument letter memorandum to this Court, that relief from this responsibility was never formally prayed for to the district court.

[35] *See Kruelle v. Biggs*, No. 79-481, Letter Opinion (Jan. 8, 1980).

[36] *See* Post-trial letter memorandum from NCCSD to Judge Stapleton, Feb. 4, 1980. 7a.

[37] The school authorities could have cross-claimed against other state agencies had they wished to present the precise question of liability under the DDA.

[38] *See* H.R. Rep. No. 95-1188, *reprinted in* [1978] U.S. Code Cong. & Ad. News, 7361.

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> mately $85 million expressly set aside under Title I of the Elementary and Secondary Education Act in addition to the funds available under part A of the Act for handicapped children, $51 million under the set-aside in the vocational Education Act, $25.7 million under Title III of the Elementary and Secondary Education Act, and additional funding available under the Rehabilitation Act, the Head Start Program, social services, and the Developmental Disabilities Act.
>
> S. Rep. No. 168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News, 1425, 1447.

The clear legislative intent to utilize all such federal funds "in a way which will assist the States in meeting the priorities and timetables under this Act"[39] alleviates what the educational authorities perceive to be the inequities of placing the financial burden on them alone.

V.

We conclude that the district court did not err in ordering residential placement for Paul under the terms of the Education Act. Further, the court was not in error in placing responsibility for providing an appropriate education for Paul on the State Board of Education. Accordingly, the judgment of the district court will be affirmed.

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[39] *See* S. Rep. No. 168, 94th Cong., 1st Sess. *reprinted in* [1975] U.S. Code Cong. & Ad. News, 1447.

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→ These letters have been edited to eliminate extraneous and irrelevant material.

Inquiry by: G. Dale Janda
Deputy Superintendent
Tulsa County Schools
500 S. Denver
Tulsa, Oklahoma 74103

### Digest of Inquiry
(October 10, 1978)

- If it is apparent handicapped children have a need for twelve-month education, should such a program be provided in their IEPs when there is no State funding for summer school?
- Is the provision of psychiatric therapy/treatment required under Part B as part of a child's educational program?
- Upon request, can parents have access to medical evaluations of their child if they are part of the child's educational records?

### Digest of Response
(January 25, 1979)

*Twelve Month Education*

Although the Act and implementing regulations do not specify the length of a school day or the number of months of school, the law does require that such decisions be a part of the development and implementation of the IEP; the law requires that the IEP describe the services to be made available, recognizing that such services are not to be restricted to those available within the school district and that parents have the right to a due process hearing if they disagree with the number of months of services provided by the IEP.

*Psychotherapy*

LEA is required to have medical services (psychotherapy) available to the extent it is necessary for evaluation or diagnostic purposes. If as a result of the service (for evaluation or diagnostic purpose), it is determined that medical treatment is required, Part B does not require that LEA pay for the treatment; however, if a State interprets psychiatric therapy as "counseling services," it is a related service and must be provided at no cost to the parent if listed in the child's IEP.

*Educational Records*

Under Reg. 121a.563, a participating agency must permit parents to inspect and review any education records relating to their child, including a child's medical evaluation if a part of that record.

### Text of Inquiry

In a discussion with Dr. Charles Cordova regarding several questions relative to P.L. 94-142, he suggested that I write to you for clarification.

I am Deputy Tulsa County Superintendent in an intermediate unit which administers several cooperative special education programs. Among the more complex of the programs is a group of Developmental Centers with sites located both at children's hospital and public school buildings. Approximately 150 severely and profoundly multiply handicapped children, ages birth to 12 are currently being served. The program is funded by a combination of Federal, State, local, and private monies. It is a cooperative program with public school accreditation. Oklahoma Statutes have mandated for sometime that severely and profoundly and/or multiply handicapped children be provided a minimum 5-hour daily program from birth. A significant aspect of this project is the high level of sophistication which we have fostered in the parents regarding their rights and privileges under P.L. 94-142, Section 504 of the 1973 Rehabilitation Act.

A recurring question raised by parents in the IEP-Placement Team meeting relates to an extended school term, *i.e.*, summer school. Even though it is quite apparent that many of these children have an obvious need for a year-round program I have been reluctant to include it in the IEP for fear that it may be binding on the local school district. Let me hasten to say that there is presently no funding mechanism in the State of Oklahoma for summer school.

Several parents are demanding psychological counseling and/or psychiatric therapy as a part of their child's educational program. We plan to provide psychological counseling, however, I find no requirement in the Federal Law for the provision of psychiatric therapy/treatment and, furthermore, the general interpretation of the State Law has been that such services are not legal expenditures for public school districts.

A third problem which we repeatedly encounter relates to the release of confidential information. All children at the Developmental Centers are entered by transfer. State Statutes require that a current evaluation accompany all special education transfers before they can be approved. By virtue of the age and type of handicap of the population which we serve, the preponderance of evaluative data available is either medical or psychological in nature. I have assumed that once an evaluation accompanies a transfer for a child that it should automatically become a part of that child's cumulative folder. I have interpreted the law to mean that upon request parents be given access to their child's folder and a copy of all contents therein. Hence, the problem. Medical doctors are a bit disenchanted with me for making copies of their evaluations available to parents who had been denied both copies and access to such information by the medical doctor.

It would be very helpful to me if you would respond to each of the above questions with an official opinion which I might have the liberty of using when dealing with groups of parents and school administrators. I would appreciate your due consideration and prompt reply.

### Text of Response

This is in response to your letter of October 10, 1978, in which you asked several questions relative to P.L. 94-142. Please accept our apology for the delay in responding.

In your letter, you raised a series of questions regarding specific problems you are having in implementing P.L. 94-142. I will respond to your questions in the following paragraphs.

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Your first question relates to an extended school term, *i.e.*, summer school placement for handicapped children. Although I am sure you are familiar with the provisions of P.L. 94-142, it may be helpful to summarize the Federal requirement. The Education for All Handicapped Children Act requires that each handicapped child must have available a free appropriate public education. The law and its implementing regulations do not specify the length of a school day or the number of months of school. However, the law does require that such decisions be a part of the development and implementation of an Individualized Education Program (IEP). If parents disagree with the program the school district proposes (including any disagreement concerning the number of months the program will be offered), they have a right to a due process hearing. The law requires that the IEP describe the services that are to be made available, recognizing that such services are not to be restricted to those that are available within the school district.

Your second question concerned medical services (psychiatric therapy) as a requirement under Part B. Medical services are defined in the regulations as services provided by a licensed physician to determine a child's medically related handicapping condition (Reg. 121a.13(b)(4)). These medical services may include special examinations or evaluations to determine neurological impairment or damage by a medical doctor specializing in that area. This activity is the responsibility of the LEA if it is for purposes of evaluation or diagnosis to determine a handicapping condition. The LEA is required to have medical services available to the extent that they are necessary for evaluation or diagnostic purpose. If as a result of the medical service (for evaluation or diagnostic purpose) it is determined that medical treatment is required, Part B does not require that the LEA pay for the treatment. It should be indicated that parents cannot be required to bear the expenses of a medical service for diagnostic or evaluation purposes. In addition, if psychiatric therapy is interpreted in your State as a medical service (*i.e.*, administered by a licensed physician), this service would not be required under Part B. Under the law and regulations medical services are for diagnostic purposes only. On the other hand, some states interpret psychiatric therapy as "counseling services," which is included as a related service under the Act. In this case, the services would have to be provided at no cost to the parents if they are listed in the child's IEP.

In response to your last question, you are correct to assume that parents have a right to see their child's medical evaluation if it is part of the child's education records. According to Reg. 121a.563 of the Part B regulations, a participating agency must permit parents to inspect and review any education records relating to their child which are collected, maintained, or used by the agency.

William D. Tyrrell
Chief
State Policy Section
Bureau of Education for
the Handicapped

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Inquiry by: Robert F. Millman, Esq.
Littler, Mendelson, Fastiff and Tichy
The Hartford Building, 20th Floor
600 California Street
San Francisco, CA 94108

**Digest of Inquiry**
**(May 22, 1979)**

■ What is the obligation of LEA to pay for private psychotherapy of handicapped student; is psychotherapy a "related service" under Pub. L. 94-142 and/or § 504?

**Digest of Response**
**(June 5, 1979)**

✔ Where "psychotherapy" can be provided, under state law, by someone other than a psychiatrist (*e.g.*, psychiatric social worker) and psychotherapy is needed to assist handicapped child to benefit from special education, psychotherapy might be considered a related service under Reg. 121a.13.

✔ The general issue of whether psychotherapy provided by a psychiatrist might be an appropriate related service is under study by BEH.

**Text of Inquiry**

Thank you for your letter dated May 9, 1979.

Your letter states that the obligation of a local educational agency (LEA) to pay for private psychotherapy for a handicapped student is at this time (as of May 9, 1979) unresolved. You articulate the position that the general issue of whether psychotherapy is to be defined as a "related service" under Public Law 94-142 and/or Section 504 of the Rehabilitation Act of 1973 is under study.

On April 23, 1979, I spoke with Mr. William Tyrrell, Chief of the Policy Section for the Bureau of Education for the Handicapped. Mr. Tyrrell stated to me that as of that date private psychotherapy was *not* a "related service" under Public Law 94-142. He took no position with respect to Section 504 of the Rehabilitation Act of 1973. Apparently, there may be a change in position by the Bureau of Education for the Handicapped relating to the definition of "related service" under Public Law 94-142. I do look forward to learning the position(s) of your office with respect to the definition of "related services" under both statutes as soon as a new position(s), if any, is (are) formulated.

**Text of Response**

Thank you for your May 22 letter. I shall attempt to clarify any misunderstanding you might have regarding BEH's position on psychotherapy, under Part B of the EHA, as amended by P.L. 94-142.

First, psychotherapy is *not* listed as a related service under either the Act or regulations. However, the comment following Section 121a.13 of the regulations states:

> The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music and dance therapy), if they are required to assist a handicapped child to benefit from special education.

The term "psychotherapy" can create a semantic problem, since in some States (and with certain professional disciplines) "psychotherapy" might be provided by someone other than a psychiatrist (*e.g.*, a psychiatric social worker, etc.). In such cases, the provision of psychotherapy by someone other than a psychiatrist could be considered to be an appropriate related service under the regulations—if the service is needed to assist a handicapped child to benefit from special education.

Second, the general issue of whether psychotherapy provided by a psychiatrist might be an appropriate related service *is* under study. The critical point to be determined is whether there are circumstances in which psychotherapy provided by a psychiatrist might be considered to be a basic related service under the Act rather than being a medical service.

I hope that this letter is helpful to you. If you have additional comments or questions regarding this matter, please let me know.

Thomas B. Irvin, Chief
State Policy and Administrative
Review Branch, DAS
Bureau of Education for the
Handicapped

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Inquiry by: Mr. T.D. Beck
5119 Concordia St.
Fairfax, VA 22031

**Digest of Inquiry**
(October 30, 1979)

- What is school district's obligation to implement IEP properly developed and agreed upon by district and parents?
- What services is school district obligated to provide to child whose IEP was properly developed and agreed upon by district and parents, but which is now being contested in due process procedures?
- Is school district obligated to pay for transportation, room and board, and psychological services for child whom it has placed in residential facility, if those services are required by facility as part of program?
- Is a school district obligated to pay for a twelve month day program if such program is included in child's IEP?

**Digest of Response**
(November 6, 1979)

- An IEP is not a contract or legal document but a "commitment of resources necessary to enable a handicapped child to receive needed special education and related services"; the services included in the IEP must either be provided or the IEP amended.
- Under Reg. 121a.513, school district must continue services described in child's IEP if complaint procedures are initiated; this includes administrative and judicial procedures.
- Residential placement, including "non-medical care and room and board," must be provided at no cost to parents under Reg. 121a.302 if it is necessary to provide special education to the child.
- Under Reg. 121a.13, transportation and psychological services must be provided as related services when required. "The nature of the services rendered under this terminology [i.e., psychotherapy] causes it to become a semantic problem that must be State specific."

**Text of Inquiry**

I would appreciate it very much if you could provide clarification of the rules and regulations pertaining to the Education of the Handicapped Act. Clarification is requested on the following issues.

1. Responsibility and requirement for the school system to implement an Individualized Education Program (IEP) when provisions in the IEP have been agreed upon and signed by the public school official, private school officials and the parent.

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2. Responsibility and requirement for the school system to continue to provide items agreed upon and contained in the signed IEP, but under dispute and appeal in the next annual review. Do the provisions once agreed upon but now disputed by the school system have to continue if the parents do not agree to delete these provisions and have initiated a due process review? Must the school system continue to provide for and pay for the disputed services pending the completion of all administrative or judicial proceedings?

3. Responsibility and requirement for the school system to pay for room and board, transportation and psychological services for a residential placement by the school system when these items are a part of the program package provided and required by the program at the residential institution.

4. Requirement for the school system to pay for 12 month school year program and psychological services for a day school placement when these items are included in an agreed upon and signed IEP.

This information is needed for a state review of a special education hearing. A reply by November 9, 1979 is requested.

**Text of Response**

This letter is being developed in response to an inquiry you sent on October 30, 1979 requesting clarification of the P.L. 94-142 regulations. I will attempt to respond to each of your concerns as stated.

1. Responsibility and requirement for the school system to implement an Individualized Education Program (IEP) when provisions in the IEP have been agreed upon and signed by the public school official, private school officials and the parent.

While the IEP is seen as neither a legal document nor a legal contract it does represent a commitment of resources necessary to enable a handicapped child to receive needed special education and related services. In fact, the delineation of services to be provided is one of the primary purposes of the document. In effect, the IEP is an agreement (with LEA and parental approval) for services to be provided. Stated another way, the services set out in the IEP must either be provided to the child, or the IEP must be amended.

2. Responsibility and requirement for the school system to continue to provide items agreed upon and contained in the signed IEP, but under dispute and appeal in the next annual review. Do the provisions once agreed upon but now disputed by the school system have to continue if the parents do not agree to delete these provisions and have initiated a due process review? Must the school system continue to provide for and pay for the disputed services pending the completion of all administrative or judicial proceedings?

If the school system placed the child in a given program with specific services as outlined in the IEP and a disagreement develops regarding services being provided, the provisions of Section 121a.513 of the P.L. 94-142 regulations apply if a complaint has been filed.

[Text of Reg. 121a.513 is deleted.]

Therefore, the local school district must continue services until all complaint proceedings have been completed. This includes administrative as well as judicial proceedings. Exceptions to this provision may be taken *only* if both the parents and the school district agree otherwise.

3. Responsibility and requirement for the school system to pay for room and board, transportation and psychological services for a residential placement by the school system when these items are a part of the program package provided and required by the program at the residential institution.

Section 121a.302 of the 94-142 regulations states that if placement in a public or private residential placement is necessary to provide special education and related services to a handicapped child, the program including non-medical care and room and board must be at no cost to parents. Clearly, transportation and psychological services are to be provided if necessary as a part of the related services component as delineated in Section 121a.13(a) and (b)(8) of the aforementioned regulations. Caution must be exercised to assure that "psychological services" to be provided falls within the criteria of 121a.13(b)(8). The issue of whether psychotherapy should be included under related service is under study. The nature of the services rendered under this terminology causes it to become a semantic problem that must be state specific.

The federal regulations address the delivery of services as specified in the IEP. The special education and related services to be provided for the handicapped child must be delineated in the IEP prior to placement in a private school or institution. The requirement is defined in Sections 121a.347 and 121a.343 of the regulations of 94-142. All of these provisions must be met.

4. Requirement for the school system to pay for 12 month school year program and psychological services for a day school placement when these items are included in an agreed upon and signed IEP.

As indicated in the response to issue No. 1, above, the services set out in the IEP must either be provided to the child or the IEP must be amended. At this time, no Federal policy position on the provision of a 12 month program has yet been developed, although litigation is occurring in several States on this issue (most notably, in *Armstrong v. Kline* (ED PA 1979)). The answer provided for issue No. 3 concerning psychological services applies to day school as well as residential placements.

We hope that these responses are helpful to you as you prepare for your hearing. If we can be of further assistance feel free to write or call me at (202) 245-9405.

William D. Tyrrell
Chief, State Policy Section
State Policy and Administrative
Review Branch, DAS
Bureau of Education for
the Handicapped

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**Inquiry by:** Raphael Minsky
Diagnostic and Professional Support Team
Montgomery County Public Schools
850 Hungerford Drive
Rockville, Maryland 20850

### Digest of Inquiry
(November 22, 1977)

- (1) If psychologist, following evaluation, recommends psychotherapy for child, is school system obligated to pay for this service, since referral emanated from school district's work on behalf of child?
- (2) If audiologist recommends hearing aid for student, is school district responsible for costs of hearing aid when recommendation came from screening process initiated by school system?
- (3) If resource teacher of visually impaired makes recommendation for services not provided by LEA, does LEA have to pay for recommended services?
- (4) If social worker recommends visual training exercises provided by optometrist for student with diagnosed learning disability, is school system responsible for paying costs?
- (5) If pupil personnel worker refers student for neurological evaluation as recommended by psychological evaluation, is school system responsible for costs involved?

### Digest of Response
(April 7, 1978)

- Where, following initial evaluation, it is determined that child needs special education and related services, and these direct and related services are included in the IEP, they must be furnished at no cost to parents.
- If State interprets psychotherapy as "medical service," LEA is not obligated to provide such service, since Reg. 121a.13 requires medical services for diagnostic and evaluation procedures only; if State interprets psychotherapy as "counseling services," services must be provided at no cost to parents if they are listed in IEP as related services.
- Hearing aids are generally considered individually prescribed devices that are personal items, which are not required to be provided under EHA/Part B.

### Text of Inquiry

I would appreciate your written responses to the following questions as they relate to the development of an IEP, a student enrolled in a special education program or in process of being identified for enrollment and for a student without any handicapping condition.

1. If a psychologist, following an evaluation, recommends to parents the need for psychotherapy on the part of their child, does the school system obligate itself to paying for this service since the referral emanated from its work on behalf of the involved student?
2. If an audiologist recommends a hearing aid to a student, is the school system responsible for the costs of this instrument when the recommendation came from the audiometric screening process initiated by the school system?
3. If a resource teacher of the visually impaired makes a recommendation for services not provided by the local education agency, does the system have to pay for the recommended service?
4. If a social worker recommends visual training exercises provided by an optometrist for a student with a diagnosed learning disability, is the school system responsible for paying the costs?
5. If a pupil personnel worker refers a student for neurological evaluation owing to the recommendations provided in the psychological evaluation, is the school system responsible for the costs involved?

These are examples of the types of questions we are now facing from both professionals and the public-at-large and I would appreciate hearing from you on this matter as it relates to the Rehabilitation Act of 1973, Section 504, Nondiscrimination and P.L. 94-142.

### Text of Response

In your letter, you raised a series of questions concerning the financial obligation of the district when various evaluation personnel and other school staff make recommendations for services to individual handicapped children (e.g., if a psychologist recommends psychotherapy, an audiologist recommends a hearing aid, a resource teacher recommends a service that is not available in the district, a social worker recommends visual motor exercises provided by an optometrist, and a pupil personnel worker refers a student for a neurological evaluation).

We feel that the following paragraphs apply essentially to each of the specific questions raised in your letter:

First, there is a distinction between things that happen as part of the evaluation process and things that transpire at an IEP meeting. The evaluation process is the first step in determining a child's need for special education and related services.

The regulations impose only general (minimum) standards with respect to evaluation (as set out in Regs. 121a.530-121a.534). The procedures for carrying out these requirements are left to each State and local educational agency (including such matters as who the team chairperson

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should be, how recommendations are made for further evaluation, what areas of evaluation are to be covered, and who does the evaluation).

If it is determined through the above process that a given handicapped child needs to be evaluated in a particular area (e.g., to receive a neurological examination), that evaluation must be carried out at no cost to the parents.

If a handicapped child is already in a special education program and a recommendation is made for further evaluation(s), this would be similar to the reevaluation requirement in Reg. 121a.534. However, the actual process for referring a child is left to each State, and could vary from case to case. (For example, a teacher might refer a child for reevaluation directly to the special education coordinator or this determination could be made at an IEP meeting.)

Once the evaluation is completed, an IEP meeting is conducted to develop a written statement for each handicapped child, including a statement of the specific special education and related services to be provided to the child. The special education and related services listed in the child's IEP must be provided at no cost to the parents. The financial responsibility for providing these services is determined by State statute or regulation.

Since the parents participate in the development of the IEP for their child, they have the option to accept or reject the services that are proposed. If the parents are not satisfied, they may protest and must be provided an opportunity for an impartial due process hearing.

I should point out that the exact nature and extent of services to be provided to individual handicapped children are educational judgment questions which must be determined through the IEP process and, where necessary, through the due process procedures set out in the regulations. These specific educational judgment questions (e.g., the amount of speech therapy a particular child should receive) generally cannot be considered or resolved at the Federal level.

While the preceding paragraphs apply generally to the questions raised in your letter, the following comments must be added with respect to your questions on psychotherapy and hearing aids:

1. If psychotherapy is interpreted in your State as a medical service (i.e., administered by a licensed physician), this service would not be required under Part B. Under the law and regulations medical services are for diagnostic purposes only. On the other hand, some States interpret psychotherapy as "counseling services," which is included as a related service under the Act. In this case, the services would have to be provided at no cost to the parents if they are listed in the child's IEP.

2. Individual prescribed devices (e.g., glasses and hearing aids, etc.) are generally considered to be personal items, which are not required to be provided under Part B.

I discussed this letter today with Mr. John Wodach of the Office for Civil Rights and he indicated that it is consistent with the interpretation of Section 504 of the Rehabilitation Act of 1973.

Thomas B. Irvin
Acting Chief
State Policy and Administrative
Review Branch
Bureau of Education for the
Handicapped

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**Berkeley (CA) Unified School District**
**July 26, 1979**

**[Ed. Note:** OCR, Region IX, consolidated its findings for four complaints filed against the Berkeley Unified School District into one Letter of Finding issued on July 26, 1979. Reproduced below are OCR's findings which address two of the complaints.]

Parents alleged that district violated § 504 through its failure to appropriately evaluate and place student, notify them of district's § 504 responsibilities, and provide procedural safeguards in its evaluation and placement of student.

*HELD*, district failed to properly evaluate student and offer him a FAPE. District's evaluation in October, 1978 consisted of administration of one intelligence test and one meeting with parents. In November, 1978, parents obtained independent evaluation which recommended that student participate in sensory motor integration program and be provided with speech and language therapy. District, which did not consider results of independent evaluation until fair hearing was convened in January, 1979, provided student with no formal education between September, 1978 and February, 1979. Moreover, district failed to provide parents with any notice of their rights, of a grievance procedure, or district's § 504 responsibilities. To remedy noncompliance, district was directed to pay costs of student's tuition at school recommended by fair hearing panel. Also, parents were reimbursed for one-half of costs of independent evaluation, speech therapy costs incurred after September, 1978 and any transportation expenses incurred for educational purposes after September 1, 1978. Finally, because parents had right to obtain counsel to insure student obtained a FAPE, and district failed to notify parents of those rights, district was directed to reimburse parents for $500 attorney fees.

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Dr. Laval Wilson, Superintendent
Berkeley Unified School District
1414 Walnut Street
Berkeley, CA 94709

Re: Nos. 79-1026, 79-1039, 79-1041, 79-1042

The Office for Civil Rights has completed its investigation of the complaints which alleged that the Berkeley Unified School District discriminates on the basis of handicap by not complying with the regulations implementing § 504. As you know, representatives of the District and their attorneys and our Office staff members met on April 26, 1979. As Helen Walsh of my staff informed those present at that meeting, that meeting was conducted as an accommodation to enable the District to hear our findings and suggested remedies for the noncompliance found, so that the District could come into compliance with § 504 without the issuance of a formal letter of findings. We have received the May 14, 1979 letter from the law firm of Littler, Mendelson, Fastiff & Tichy which indicated the District's position concerning the complaints filed by [ ], [ ], [ ], and [ ]. This letter does not bring the District into compliance with § 504 of the Rehabilitation Act of 1973. We have also received the July 11, 1979 letter which likewise does not address all areas of noncompliance found, nor make specific proposals of remedy. Based on the above, we are informing you that the District must now be cited as being in violation of § 504 of the Rehabilitation Act of 1973. Our notification follows.

These complaints allege that the District does not comply with the general provisions of 34 CFR Part 104 (Subpart A); does not provide program accessibility (Subpart C); and does not provide a free appropriate public education for all students who are disabled and live in the District's jurisdiction, including [ ], [ ], and [ ] (Subpart D). The District was notified of these allegations on January 15, 1979, and February 5, 1979. We concluded that the District violates § 504 of the Rehabilitation Act of 1973 because it does not comply with the above mentioned parts of the regulation.

We are enclosing a Statement of Findings, which is to be considered as part of the Letter of Findings for all four complaints. This document explains the factual and legal basis for our noncompliance determinations, and the steps that are required for the District to remedy them. Reg. 104.6(a)(1) of the Regulation provides that the District must take "such remedial action as the Director deems necessary to overcome the effects of the discrimination." Failure to correct the violations may lead to administrative enforcement proceedings against the District and deferral of Federal funds from the Department of Health, Education, and Welfare. The order of the U.S. District Court for the District of Columbia in *Adams v. Califano* requires that enforcement proceedings commence within 90 days of the date of this letter, if voluntary compliance is not achieved.

Please contact this Office within ten (10) days of the receipt of this letter informing us of your intentions for remedying the violations. Should the District fail to take the remedial action required by the Director and if voluntary compliance is not otherwise achieved, the section-by-section analysis of § 504 explains that "the ultimate sanctions of court action or termination of Federal financial assistance may be imposed." However, the Office for Civil Rights is always available to provide whatever assistance we can to help your District remedy these violations. We believe it would be in the best interest of all parties if the issues are settled without our having to resort to enforcement proceedings.

If you have any further questions, please call John E. Palomino, Director, Elementary and Secondary Education Division, at (415) 556-6006.

Under the Freedom of Information Act (FOIA, 5 U.S.C. § 552), it may be necessary for the Office for Civil Rights to release this document and related correspondence in response to inquiry.

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Statement of Findings
By the Office for Civil Rights
Department of Health, Education, and Welfare

II. The [ ] Complaint

A. ALLEGATIONS: The [ ]s allege that the District discriminated against [ ] by denying him participation in an educational program because of handicap; that the District did not properly notify them of their responsibilities under § 504; that the District did not provide [ ] with an appropriate public education; that the District did not provide an appropriate educational setting for [ ]; that [ ] was not appropriately evaluated and placed; and that the District did not provide procedural safeguards in the evaluation/placement of [ ].

B. FINDINGS: Our investigation showed that [ ] is a qualified person who is disabled and who lives in the jurisdiction of the District. Evidence obtained by OCR demonstrates that [ ] was inappropriately evaluated and placed by the District. His evaluation consisted of the administration of one intelligence instrument (Stanford-Binet) and one parent interview and was conducted on October 5 and 6, 1978. During October and November of 1978, his parents obtained an evaluation from Dominican College which recommended that [ ] participate in an intensive sensory motor integration program, speech and language therapy, and training in auditory verbal processes. On October 19, 1978, the [ ]'s attorney requested a fair hearing which was held on January 22, 1979. There is no evidence that the District considered the evaluation data from the Dominican College until the fair hearing. The fair hearing panel determined that [ ] needed the programs recommended by the Dominican College evaluation and that [ ] needed to attend the Growing Mind School on a full-time basis. The panel also recommended that [ ] be reevaluated by the District and Growing Mind by June 15, 1979. This reevaluation was to include assessments by a speech and language pathologist, an educational specialist, a sensory motor specialist, and a more complete psychological evaluation. The fair hearing panel also determined that the District had not provided the [ ]s with any written communications concerning parental rights. Our investigation revealed that the parents of [ ] were not notified of a grievance procedure for § 504 complaints, the District responsibilities, or procedural safeguards, as required by § 504 Regs. 104.7(b), 104.32(b), and 104.36, respectively. Because of the District's noncompliance with § 504:

1) [ ] was denied an appropriate educational setting from September of 1978 to February of 1979 because he did not receive any formal education during this time period [Reg. 104.33(b)],
2) [ ] was denied speech therapy from September of 1978 to May of 1979 [Reg. 104.33(b)],
3) [ ]'s parents incurred expenses for:
   a) one-half the Dominican College evaluation fee (aproximately $100.00),
   b) legal fees (approximately $500.00),
   c) speech therapy fees (approximately $700.00), and
   d) transportation costs [Reg. 104.33(c)].

C. REMEDIES: To comply with the requirements of § 504, the District must:

1) provide an assurance that [ ] is receiving a free appropriate public education with documentation which includes evidence of payment for tuition at the Growing Mind School,
2) provide evidence that the parents of [ ] have been reimbursed for their payment for the evaluation conducted by Dominican College,
3) provide documentation which would show reimbursement of legal expenses incurred by the [ ]s to obtain a free appropriate public education for [ ], as: a) the [ ]s had to obtain counsel to be informed of their parental rights and to exercise these rights, and b) the District had not provided notice as required by Regs. 104.8 and 104.32(b) or parental rights as required by Regs. 104.7(b) and 104.36. Under these circumstances, it is appropriate to require reimbursement of attorney fees as remedial action.
4) provide an appropriate education during the summer school vacation period(s) for [ ] until the effects of the District's discriminatory practices are eliminated.
5) provide evidence of speech therapy services, in a manner which would be of no cost to the parents of [ ]. The District must reimburse the parents of [ ] for speech therapy services incurred after September 1, 1978,
6) provide evidence of reimbursement of transportation expenses to [ ]'s parents for educational purposes since September 1, 1978,
7) provide evidence that the District has complied with Reg. 104.7(b) and 104.36. This has been addressed in the [ ]s complaint remedies, and
8) provide evidence that the District has complied with Reg. 104.32(b) which states that the District must take appropriate steps to notify handicapped persons and their parents or guardians of its responsibilities under § 504.

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Student was removed from special education program in September, 1977 without evaluation or notice to parent; after parental request for reevaluation, district failed to evaluate student or develop IEP because it had misplaced special education files. On basis of 1978 independent evaluation, parent obtained private tutoring and psychotherapy for student. In February, 1979, district developed IEP which placed student in regular classroom and provided for tutoring and psychotherapy. However, district refused to pay psychotherapy costs because it considered psychotherapy to be a medical, not related, service. Fair hearing panel decided that parent should be reimbursed for costs of independent evaluation, tutoring and psychotherapy. On appeal by district, psychotherapy was defined as a medical service. Parent brought complaint alleging that student had been denied a FAPE, had been inappropriately evaluated and placed, and

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that parent had not been provided notice of grievance procedures or § 504 procedural safeguards.

*HELD*, in accord with decision of fair hearing panel, district violated § 504. Psychotherapy is a psychological service and, therefore, a related service, as it is necessary for student to fulfill his educational needs. Therefore, district was directed to reimburse parent for independent evaluation and costs of tutoring and psychotherapy since September 1, 1978.

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IV. The [ ] Complaint

A. ALLEGATIONS: Ms. [ ] alleged that her son, [ ], has not been provided a free appropriate education; that [ ] was inappropriately evaluated and placed; and the District did not provide a grievance procedure or procedural safeguards as required by § 504.

B. FINDINGS: Our review showed that [ ] is a qualified person who is disabled and who lives in the jurisdiction of the District. Our findings evidence that [ ] received special education and/or related services since he was in the first grade and he was removed from his program about September of 1977, without an evaluation or notice to his parent. There is no evidence that would indicate that Ms. [ ] was informed by the District of its responsibilities [Reg. 104.8 or 104.32(b)] or her parental rights [Reg. 104.7(b) or 104.36]. Ms. [ ] attempted to obtain a reevaluation of her son by the District. The District did not evaluate or develop an individual educational plan for [ ] because his special education folder had been misplaced, according to Ms. [ ] on February 26, 1979, Ms. Colvin (a psychologist for the District) on February 26, and March 5, 1979, and Mr. Nagai (a Co-Director of Special Education) on March 6, 1979. Our investigation showed that [ ] was evaluated by Reach . . . for Learning during September of 1978 and that this evaluation fee was paid by his parent. In accordance with this evaluation and previous evaluations by the District, Ms. [ ] obtained private tutoring and psychotherapy services for her son. The District developed an individual educational plan for her son on February 2, 1979, which determined that [ ] was to be placed in a regular classroom setting with daily tutorial assistance and psychotherapy. The individual educational plan evidenced that the District did not question [ ]'s need for psychotherapy, but it defined psychotherapy as a medical service and not as a related service. Therefore, the District would not provide this service for him. Ms. [ ] requested a fair hearing which was held on February 26, 1979. The fair hearing panel determined that Ms. [ ] should be reimbursed for the cost of the independent evaluation and tutorial assistance and psychotherapy services since October of 1977 (the effective date of P.L. 94-142). The panel also determined that the District should currently provide tutorial and psychotherapy services. The District appealed the decision regarding psychotherapy as a related service. Upon information and belief, the appeal decision defined psychotherapy as a medical service.

The findings of our investigation are very similar to the findings of the fair hearing panel. We find that Ms. [ ] should be reimbursed for the cost of the independent evaluation and the costs of tutorial assistance and psychotherapy services since September 1, 1978. We also find that the District is responsible for any transportation expenses incurred by Ms. [ ] in obtaining this evaluation and these services. We find that Ms. [ ] has been partially reimbursed for these educational expenses. We find that the District is responsible for complying with the provisions of the individual educational plan which included tutorial and psychotherapy services.

The term "related services" is not defined in the § 504 regulations. However, the section-by-section analysis of § 504 of the Rehabilitation Act of 1973 explains that an appropriate education could consist of:

> . . . education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as development, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services—42 FR 22690, col. 3, May 4, 1977).

The Office for Civil Rights has determined that psychotherapy is a psychological service and, therefore, a related service, as it is necessary for [ ] to fulfill his special educational needs.

In order to determine what constitutes a "related service," OCR has also relied on Part B of the Education for the Handicapped Act regulations, which states:

> (a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.
>
> (b) The terms used in this definition are defined as follows . . .:
>
> (8) "Psychological services" include . . ."
>
> (v) Planning and managing a program of psychological services, including psychological counseling for children and parents (45 CFR Reg. 121a.13, as cited in 42 FR 42479, August 23, 1977).

C. REMEDIES: To comply with the requirements of § 504, Reg. 104.33(c), the District must reimburse Ms. [ ] for all the educational expenses listed above since September 1, 1978. The District stated that this procedure could be

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accomplished on a timely basis—a two to four-week period—in the April 26, 1979, meeting with the District's personnel and OCR representatives. The District must also provide tutorial and psychotherapy services for [ ] as stated in the District's February 2, 1979, individual educational plan, as required by Reg. 104.33(b). The District must comply with Reg. 104.7(b), 104.8, 104.32(b), and 104.36, as stated under the [ ], [ ], and [ ] complaints. Evidence that the District has complied with these remedies must be submitted to OCR.

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**Connecticut Department of Education**
**October 17, 1979**

[Ed. Note: *See also* Bethel (CT) Board of Education (OCR-11/27/79), p. 257:55; Case No. 79-06 (CT SEA), 3 EHLR 501:257.]

Complaint alleged that school district violated § 504, Reg. 84.33, by refusing to pay full costs, including psychiatric costs, for residential placement which it had recommended for a handicapped child. Complaint further alleged that district's placement of child during pendency of State-level review violated § 504 because the placement had not been shown to be appropriate.

*HELD*, school district's failure to pay full costs of child's residential placement violated § 504, Reg. 84.33(a), (c). In addition, State statute and regulations on which district's action was based violated § 504, Regs. 84.4(b)(4) and 84.33, and Pub. L. 94-142, Reg. 121a.13, by prohibiting payment for medical and psychiatric services. OCR rejected State's argument that such services are not educational services, concluding instead that "medical, emotional and psychiatric services are within the meaning of related aids and services" when required by handicapped child to obtain same benefits from education as nonhandicapped child. By excluding such services, OCR ruled, the district was asking the parents to pay for a portion of child's recommended placement, in violation of Reg. 84.33(c). When parents refused, district placed child in inappropriate day program. District based this placement on incomplete evaluation, thereby violating Reg. 84.35, which requires a free and thorough evaluation. OCR instructed State to revise all regulations in conformity with § 504.

Honorable Mark R. Shedd
Commissioner of Education
State Department of Education
P. O. Box 2219
Hartford, Connecticut 06115

The Office for Civil Rights has concluded its investigation into the allegations against the Bethel Board of Education (Complaint No. 01-79-1056). This letter notifies you that we have found the Bethel Board of Education in violation of the regulation governing the implementation of Section 504 of the Rehabilitation Act of 1973. A copy of the statement of findings against the Bethel Board of Education is enclosed for your information. During our investigation of this complaint, we reviewed the applicable sections of the Connecticut General Statutes, 10-76(a-h) and your Department's administrative regulations and guidelines for providing special education services by local education authorities. We have also concluded that several of the administrative regulations and guidelines issued by your Department are inconsistent with the provisions of Section 84.4(b)(4) prohibiting discrimination against a qualified handicapped person and with the free and appropriate public education requirement of Section 84.33(a)(b) and (c) of the Regulations implementing Section 504 of the Rehabilitation Act of 1973.

[Texts of Regs. 84.4(b)(4) and 84.33 are deleted.]

In particular, Connecticut State Statute 10-76d(d)(2) states that if ". . . the requirements for special education could be met by a program within the district or by agreement with another board of education *except for the child's need for services other than educational services such as medical, psychiatric or institutional care or services*, (emphasis added) said board may meet its obligation to furnish special education for said child by paying the reasonable cost of special education instruction in a private school, hospital or other institution . . ." Further, Section 1a of the general guidelines promulgated by your Department entitled "Special Education through Arrangements with Private Schools, Agencies or Institutions" states, "In all cases medical and psychiatric services continue to be excluded from the definition of 'items necessary to the provision of special education'." Section 8 of the guidelines states, "Direct medical and psychiatric and other non educational costs are not reimburseable . . ."

In addition, Section 11(b) of the guidelines excluded from special education consultant services "(2) medical treatment, physical therapy, psychotherapy, etc. . ."

From the above we determined that both the statute, 10-76d(d)(2) and implementing guidelines require an LEA to pay only for the reasonable costs of special education if the primary reason for a residential placement is for other than educational reasons. Included in reasons other than educational are medical, emotional or psychiatric. However, medical, emotional and psychiatric services are within the meaning of related aids and services of Section 84.33(b) when it is shown they are necessary to enable a qualified handicapped person to obtain the same result, to gain the same benefit or to reach the same level of achievement to the maximum extent

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possible. The key concept is that the education must be designed to meet the educational needs of handicapped students as adequately as the needs of the non-handicapped students are met. Thus, the obligation for provision of special education is not limited to special education instruction or academic aids and services, but includes the provision of aids and services which are necessary to allow handicapped students the opportunity to benefit from a free and appropriate education regardless of the severity of handicap.

Section 121a.13 of the regulations implementing P.L. 94-142 further defines the term related services as follows:

> (a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training

Thus, the particular provisions of the Connecticut General Statutes and guidelines are in conflict with the provisions of Section 504 and P.L. 94-142.

The effect of the exclusion of certain related aids and services from the financial responsibility of the LEA allowed the Bethel Board of Education to look to the parents to pay the part of the remaining cost of the proposed residential placement, a condition which would have resulted in an education which was not free to the parents as required by Section 84.33(c). The parents' unwillingness to pay resulted in the student's placement in an inappropriate day program rather than the agreed upon appropriate residential placement.

The cornerstones of an appropriate education are a complete and thorough identification/diagnosis and evaluation of the handicapping condition(s). The necessity of these components was recognized by the Hearing Examiners in the decision by the first hearing panel. In that decision, the Examiners decided that [ ] had not been properly evaluated; therefore, they were in no position to determine the appropriateness of any proposed placement. The Bethel Board of Education was ordered to obtain a proper evaluation and then to decide upon an appropriate placement. An evaluation was obtained from Newington Children's Hospital. Because of the nature of [ ]'s multiple handicaps, the results of the evaluation were tentative and could only be confirmed by either a period of hospitalization or residential placement.

The provisions of Section 504 and P.L. 94-142 address the need for a complete evaluation and stress that a variety of techniques should be used to determine the exact nature of the handicapping condition in a reasonable amount of time. Placement in a program is contingent upon knowing the exact nature of the handicapping condition so an appropriate placement can be made.

However, the matters of an appropriate placement and responsibility for the costs of residential placement remained unresolved and resulted in a second state hearing before the chairman of the original panel, Dr. Ricciuti. The failure of Dr. Ricciuti to recognize that the evaluation had not been completed, to require that it be completed and to inform the parties that whatever actions necessary for completion were the financial obligation of the Bethel Board of Education and not the parents violated the provisions of Section 84.35. Section 84.35 requires that evaluations be free to the parents. His subsequent placement of Alison in the RESCUE program, without benefit of a completed evaluation, ressulted in her receiving an inappropriate education.

Remedial Action

This complaint falls within the class of complaints against school districts within your jurisdiction that result in a finding of noncompliance against your Department. Compliance with the Section 504 Regulations is sought by informal means whenever possible. We therefore solicit your cooperation in taki g remedial action responsive to the findings of this letter. To this end, within 15 days of the receipt of this letter the State Department of Education should submit a plan for corrective action and a timetable for its implementation. Such plan should include:

1. Revision of all administrative regulations and/or guidelines for providing special education services which are in conflict with the stated provisions of the Section 504 Regulations.
2. An orientation or training program for all State Hearing Examiners to familiarize them with all changes resulting from revisions of the above administrative regulations and/or guidelines. The orientation or training program should also include clarification of the interrelationships of the requirements of Subparts A, B, C, E, and F of the P.L. 94-142 regulations and Subparts A and D of the Section 504 Regulations.
3. Specific steps to ensure that the Bethel Board of Education will provide [ ] with a *free, appropriate* education.

I wish to assure you of our full cooperation in assisting the Connecticut State Department of Education in the resolution of this complaint. In the event this matter cannot be resolved by informal means within ninety (90) days from the date of this letter, formal enforcement action may be initiated by commencement of administrative proceedings or by other means authorized by law.

Under the Freedom of Information Act it may be necessary to release this document and related correspondence in response to an inquiry.

If you have any questions or need technical assistance with respect to compliance, do not hesitate to contact Maria C. Montalvo, Director of the Elementary and Secondary Education Division, or Neil Green at (617) 223-6397.

John G. Bynoe
Director
Office for Civil Rights
Region I

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**Illinois Board of Education**
**Illinois Governor's Purchased Care Review Board**
**February 27, 1980**

Complaint alleged that State Board of Education and State "Purchased Care Review Board" violated § 504 by enforcing limits on placement of handicapped children in private and residential placements, even where it was agreed that such placements were appropriate. Complaint alleged that State's practice improperly forced parents to pay for services needed by children. Complaint stemmed from Review Board's practice of establishing a maximum "allowable cost" which a private or residential special education facility could charge the State for treatment of a handicapped child. In many instances, this allowable cost was substantially less than real costs of providing services.

*HELD*, State Board of Education and State Purchased Care Review Board violated § 504 by restricting handicapped children's access to appropriate private and residential placements. The two agencies also violated § 504 by refusing to pay for certain related services and by causing parents to pay for part of placements. OCR found that lack of available, appropriate, private placements was result of several factors, including refusal of private and residential facilities to accept children for whom the State offered inadequate reimbursement, and the complexity of the regulations relating to determination of allowable costs. OCR found that one reason for the difference between allowable cost and real cost for a private placement was the State's refusal to finance certain "noneducational services" such as counseling, medical services, and any other service considered therapeutic. Exclusion of these services, OCR ruled, violated § 504 and Pub. L. 94-142. There is a "legal duty to provide medical, emotional or psychiatric services" where appropriate. OCR also concluded that, although parents' insurance benefits may be used by State to cover appropriate educational expenses, State remains obligated to provide all appropriate services when the insurance benefits have been depleted. Regarding due process remedies, OCR ruled that State's refusal to conduct hearings on issues relating to financial responsibility for placements violated § 504. OCR found that neither Review Board's determinations of allowable costs nor the imposition of costs on parents were subject to due process review.

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Dr. Joseph M. Cronin
State Superintendent of Education
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777

The Office for Civil Rights has concluded from individual complaint investigations and related community information that the Illinois State Board of Education (ISBE) is violating § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, because of its failure to provide a free, appropriate, public education to a sizeable class of handicapped children. In addition, ISBE has failed to provide procedural safeguards with respect to costs parents are asked to pay in association with their handicapped child's educational placement.

Our findings take into consideration the points raised in your letters dated January 10, 1979 (sic) and January 17, 1980, sent in response to the Office for Civil Rights' (OCR's) letter to you sent on December 28, 1979. I appreciate your response to OCR's concerns regarding Illinois' placement of handicapped students requiring private residential care. OCR is aware that ISBE has taken steps to resolve the various individual crisis situations documented in your letter of January 10th.

The points raised in your letter of January 17th are discussed fully in the attached Statement of Findings. In addition, several points require explicit response.

Regarding the seven cases referred to in your January 17th letter, your information is not complete in some cases and is reflective of our concerns in others. The Letter of Findings in Shawn E., Anthony N., Michelle A., and Christopher K., attached hereto as Exhibits A, B, C, and D, address the situations fully. The Peggy B. and Brent S. cases are currently being investigated by OCR.

We are concerned by your statement that the Chicago Board of Education (the "Board") has never heard of Gregory J. On March 23, 1979, an impartial hearing officer ordered the Board to place Gregory in a residential care facility. A copy of the Order is attached hereto as Exhibit E. The Board never appealed the ruling, yet never placed Gregory accordingly. OCR is also concerned that ISBE has not monitored the compliance of the Board with respect to the order of ISBE's hearing officer. Furthermore, ISBE staff members, in units including the Compliance Review Section, have informed OCR representatives that no procedures exist for monitoring Local Educational Agency (LEA) compliance with hearing officers' decisions or administrative orders from the State Superintendent unless such monitoring is specifically requested by a concerned party (*See* 45 C.F.R. Reg. 121a.601). Moreover, as you will see in the attached Statement of Findings, our discussion of the Gregory J. case serves as the documentation requested to support OCR's concern regarding parental release of custody to DCFS solely for the purpose of obtaining a free and appropriate education.

OCR recognizes the severe limitations placed on ISBE by the School Code of Illinois, Section 14-7.02, and the policies of the Governor's Purchased Care Review Board (GPCRB). While OCR recognizes ISBE's desire to cooperatively address and remedy the problems regarding the placement of handicapped children in residential facilities, GPCRB has failed to indicate a similar desire. Without GPCRB's cooperation, ISBE is unable to make the needed changes in private placement procedures to establish compliance with § 504. Accordingly, OCR has no alternative but to issue findings against GPCRB and ISBE.

Attached is our Statement of Findings. In this Statement we provide an explanation of the specific violations and the evidence upon which these determinations are based. Also included are citations of the specific regulations violated. Further, we suggest corrective actions ISBE and GPCRB may take to remedy the violations.

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Please respond to this letter within 15 days of receipt. Your response must indicate ISBE's intent to initiate a course of corrective action which will remedy the violations explained in our Statement of Findings.

The Office for Civil Rights has been ordered by the United States District Court for the District of Columbia (Civil Action No. 3095, *Adams v. Califano*; Civil Action No. 74-172, *Women's Equity Action League v. Califano*; and Civil Action No. 75-1068, *Brown v. Califano*) to comply with the following: If a violation has occurred, HEW shall attempt to bring the affected institution into voluntary compliance through negotiations. If such corrective action is not secured within ninety (90) days of issuance of the Letter of Findings, HEW shall institute formal enforcement action by commencing administrative proceedings or by other means authorized by law within the next thirty (30) days. *See* 45 C.F.R. Regs. 84.61, 80.7(d), and 80.8. Formal enforcement action may result in the suspension, termination or the refusal to grant or continue Federal financial assistance to ISBE.

Please be assured that OCR, consistent with its statutory responsibilities, will make every effort to assist you in the development of a plan to remedy the problems referred to herein.

This letter is not intended and it should not be construed to cover any other issues regarding compliance with § 504 of the Rehabilitation Act of 1973 that may exist and which are not specifically discussed herein.

Under the Freedom of Information Act, 5 U.S.C. § 552, and its implementing Regulation, 45 C.F.R. Part 5, it is the policy of the Office for Civil Rights to release this letter and all related materials to any interested party upon request. Additionally, OCR is obligated to protect the privacy of individuals pursuant to the Privacy Act of 1974, 5 U.S.C. § 552 and its implementing Regulation at 45 C.F.R. Part 5b, and the Freedom of Information Act. Therefore, student names are coded in the Statement of Findings. The full names of students, LEAs and other related persons whose identities have been preserved are listed separately and enclosed herein. We request that you honor our intent to preserve these individuals' privacy in contacts you may have regarding our letter.

I encourage you to contact me as soon as possible at 312/353-2520 so that we may continue meaningful efforts to voluntarily resolve the issues identified in the attached Statement of Findings.

Kenneth A. Mines, Director
Office for Civil Rights
Region V (Chicago)

Dr. Robert Mandeville
Chairman, Governor's Purchased Care Review Board
Bureau of the Budget
108 State Capitol Building
Springfield, Illinois 62701

The Office for Civil Rights has concluded from individual complaint investigations and related community information that the Governor's Purchased Care Review Board (GPCRB) is violating § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. This violation results from GPCRB's policies and practices with respect to its determination of allowable costs for private facilities appropriate for Illinois handicapped children. The GPCRB's determination of these allowable costs prevents the Illinois State Board of Education (ISBE) and Local Educational Agencies (LEAs) fom providing many handicapped children a free, appropriate, public education.

I am in receipt of your letter dated January 14, 1980, sent in response to OCR's letter to you sent on December 28, 1979, in which you asked for additional time within which to respond to our concerns. However, the Office for Civil Rights has been ordered by the United States District Court for the District of Columbia (Civil Action No. 3095, *Adams v. Califano*; Civil Action No. 74-172, *Women's Equity Action League v. Califano*; and Civil Action No. 75-1068, *Brown v. Califano*) to comply with the following: If a violation has occurred, HEW shall attempt to bring the affected institution into voluntary compliance through negotiations. If such corrective action is not secured within ninety (90) days of issuance of the Letter of Findings, HEW shall institute formal enforcement action by commencing administrative proceeding or by other means authorized by law within the next thirty (30) days. See 45 C.F.R. Regs. 84.61, 80.7(d), and 80.8. Formal enforcement action may result in the suspension, termination or the refusal to grant or continue Federal financial assistance to GPCRB and/or ISBE.

Attached is our Statement of Findings. In this Statement we provide an explanation of the specific violations and the evidence upon which these determinations are based. Also included are citations of the specific regulations violated. Further, we suggest corrective actions GPCRB and ISBE may take to remedy the violations.

Please respond to this letter within 15 days of its receipt. Your response must indicate GPCRB's intent to initiate a course of corrective action which will remedy the Findings. Please be assured that OCR, consistent with its statutory responsibility, will make every effort to assist you in the development of a plan to remedy the problems referred to herein.

This letter is not intended and it should not be construed to cover any other issues regarding compliance with § 504 of the Rehabilitation Act of 1973 that may exist and which are not specifically discussed herein.

Under the Freedom of Information Act, 5 U.S.C. § 552, and its implementing Regulation, 45 C.F.R. Part 5, it is the policy of the Office for Civil Rights to release this letter and all related materials to any interested party upon request. Additionally, OCR is obligated to protect the privacy of individuals pursuant to the Privacy Act of 1974, 5 U.S.C. § 552 and its implementing Regulation at 45 C.F.R. part 5b, and the Freedom of Information Act. Therefore, student names are coded in the Statement of Findings. The full names of students, LEAs and other related persons whose identities have been preserved are listed separately and enclosed herein. We request that you honor our intent to preserve these individuals' privacy in contact you may have regarding our letter.

So that we begin meaningful efforts to voluntarily resolve the issues identified in the attached Statement of Find-

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ings, I encourage you to contact me at 312/353-2520, and Dr. Cronin, as soon as possible.

Kenneth A. Mines, Director
Office for Civil Rights
Region V (Chicago)

## STATEMENT OF FINDINGS

The Office for Civil Rights (OCR) has received numerous individual and class complaints alleging the failure of various Local Educational Agencies (LEAs) to provide free, appropriate, public education to Illinois handicapped children, in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing Regulation, 45 CFR part 84. A few complainants also alleged that they were not allowed to resolve questions of financial liability through due process procedures.

Investigation of these complaints necessitated inquiry into the practices and policies of the Illinois State Board of Education (ISBE) and its compliance with § 504. Our review of the state system took into consideration the relationship of ISBE practice with the Governor's Purchased Care Review Board (GPCRB), as well as other factors relevant to ISBE's ultimate responsibility to provide a free, appropriate education to the state's handicapped children.* [See 45 C.F.R. Reg. 80.7(c).]

The extensive evidence gathered during this investigation has enabled OCR to identify a sizeable class of handicapped children who are not receiving a free, appropriate, public education. In addition, there are no procedural safeguards regarding various aspects of parental financial liability for educational placements. These situations violate Section 504 and are described in greater detail below.

I. Handicapped children are being denied a free appropriate public education:
   B. Insufficient residential free appropriate public education (FAPE) facilities exist to meet the needs of Illinois handicapped children;
   C. Complexity of rate review system contributes to problems associated with the provision of FAPE;
   D. Great numbers of handicapped children are placed in residential facilities outside of Illinois.
   E. Parents pay part/total costs of appropriate residential facilities;
      1. Parents pay difference between actual costs and GPCRB-approved costs;
      2. Handicapped children are removed from appropriate residential facilities when insurance coverage is depleted and actual costs exceed GPCRB-approved costs;
      3. Parents are urged by ISBE, GPCRB and LEAs to apply for Individual Care Grants; parents receiving these grants are liable for a monthly, sliding-scale contribution cost;
   F. Section 504 Violations,

II. Procedural safeguards are unavailable for issues relating to financial responsibility:
   A. GPCRB-approved costs are not subject to due process review;
   B. ISBE considers costs paid by parents to other state agencies assisting in the payment of FAPE inappropriate for procedural review.

III. Conclusions and Recommendations

### I. HANDICAPPED CHILDREN ARE BEING DENIED A FREE APPROPRIATE PUBLIC EDUCATION

#### A. *Background – Residential Placement System in Illinois*

Although ISBE is the single agency responsible for the education of all handicapped children in the state, it does not have total control and a free hand in providing free, appropriate, public education (FAPE). Before districts may facilitate placements of handicapped children requiring private facilities, the "facility must be declared eligible *and* receive an approved alowable cost."[1] ISBE determines which facilities meet programmatic criteria enabling them to be eligible to educate handicapped students. The GPCRB, created by Senate Bill 395, § 14-7.02 of The School Code of Illinois, sets allowable costs for private residential and day schools serving handicapped children who cannot be appropriately served by the local education agency (LEA). Under the enacting legislation, the school district in which the child resides pays actual tuition costs for special education and related services, excluding room and board, up to a ceiling of $4,500 per year. The GPCRB must approve all placements for children if the costs increased more than 10 percent over the previous year or exceed $4,500 per year. The GPCRB also determines allowable costs for special education and related services provided by non-public schools or special education facilities. If the state funds appropriated in a fiscal year are insufficient to meet the room and board costs of placement allocated to the State Board of Education, available funds are apportioned among all approved claims. Costs for tuition over $4,500 are shared by the district and the state agency. The state agency's liability is reduced under statute by any third-party payor obligations.

Senate Bill 395 supersedes prior Illinois law which placed an absolute limit on reimbursement for private residential and day school placements of $2,000, and later $2,500, per student per school year.** However, the present

* *See* 45 C.F.R. Regs. 121a 600 and comments: ". . . to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act [Pub. L. 94-142] and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency . . . While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that "*failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.*" (Emphasis added.) *See also* ISBE assurances of above in its FY 1980 Annual Program Plan Amendment for Part B of the Education of the Handicapped Act as amended by P.L. 94-142.

[1] August 17, 1979 memorandum to Directors of Special Education, Regional Superintendents from Joseph M. Cronin, State Superintendent of Education.

** S.B. 395 is the culmination of efforts which began in 1973 with an ISBE committee which studied the need for a

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law in effect limits the LEA to placements which cost less than $4,500 per student per school year, exclusive of room and board. All residential placements which will involve public expenditure by the state educational system for room and board, and all costs of education and related services beyond $4,500, must be approved by the GPCRB. Any expenses not approved by GPCRB are the responsibility of the parent or a third-party payor.

ISBE's implementation of the above-cited statute and exercise of control over LEAs is reflected in Article 8.05 of the State of Illinois Rules and Regulations to Govern the Administration and Operation of Special Education which states, in pertinent part:

> When a private facility is utilized, the local district shall be responsible for payment of tuition . . . as provided by law. All such private placements shall be approved by the Illinois Office of Education . . . A school district which has been denied approval for the placement of a child in a private facility cannot independently place the child and provide the tuition.

While the Illinois legislative scheme makes possible the provision of FAPE for handicapped children, in practice many of these children are either excluded from the educational system or educated inappropriately unless their parents have agreed to pay a moderate to substantial share of the placement cost.

OCR has received information which documents GPCRB's failure to approve rates for a number of residential facilities sufficient to educate all handicapped children requiring this type of FAPE. This problem has been brought to the attention of the State Advisory Council on the Education of Handicapped Children. The Council created a subcommittee to study the ". . . lack of residential facilities for eligible handicapped students in Illinois."[2]

The extent of the problem is great. For example, according to information provided by one LEA, 28 residential facilities have been determined to be programmatically eligible by ISBE to educate emotionally/behaviorally handicapped high school students.[3] Of these facilities, only eight have GPCRB-approved rates which approximate the actual cost of the program. Five of the eight facilities have denied almost all referrals from this LEA because the handicaps involved were so severe. One facility will accept no further referrals for the 1979-1980 school year. Of the remaining two approved facilities, Elan One became approved only after a long period of uncertainty during which the facility threatened to return 41 severely handicapped children to their homes in Illinois.[4] As a result of the delay in Illinois approval, the facility has been accepting children from other states and has limited space.

Efforts to place handicapped students in appropriate facilities are severely hampered by the cost factor. One LEA contacted six facilities for placement of a 13-year-old behavior disordered girl who required residential FAPE. The LEA received responses from five of the facilities, all indicating that they no longer accepted children from Illinois because actual costs exceeded GPCRB-approved rates.[5] Another private facility reported that their rate had been approved on the basis of outdated 1978-1979 budget figures. The facility immediately received about ten referrals of children from various LEAs in Illinois. While the facility was appropriate for these children and would serve as an acceptable placement, the discrepancy between actual and GPCRB-approved rates prevented placement.[6] Although LEAs have been informed by the GPCRB and ISBE that parents could pay the difference between the Illinois allowable cost and the facility charge,"[7] more than one private facility has refused to enroll Illinois students on the condition that parents pay this difference. According to these facilities, the difference would include education, related services, room, board, and non-medical costs which may not be borne by the parents

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legislative plan to address provision, including adequate cost reimbursement, for "the number of emotionally disturbed students requiring some form of special education programming [who] are rapidly increasing." Comprehensive System for Delivery of Special Education Services to Handicapped Children with Low Prevalence Exceptionalities. From: Low Prevalence Committee, To: Dr. Michael J. Bakalis, at pp. 12-13. Prior to S.B. 395 the Illinois Appellate Court in *Elliott v. Board of Education of the City of Chicago* held that § 14-7.02 violated the Illinois Constitution by depriving a handicapped student of a tuition free education. 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978).

[2] September 6, 1979 minutes of the State Advisory Council on the Education of Handicapped Children (p. 5); November 1, 1979 Discussion Paper: Illinois Plan for the provision of Comprehensive Services for Emotionally Disturbed Students, State Advisory Council on the Education of the Handicapped Children.

[3] August 29, 1979 report by Niles Township Department of Special Education: Private Residential Facilities Placement Status Report.

[4] August 23, 1979 letter from Gerald E. Davidson, M.D., Elan One Medical Director to Joseph M. Cronin; October 4, 1979 Minutes to the Advisory Council on the Education of Handicapped Children (p. 2).

[5] February 1, 1979 letter from Jacquelyn Sanders, Director, The University of Chicago, The Sonia Shankman Orthogenic School; February 5, 1979 letter from S. Richard Hall, Supervisor of Intake, Bellefaire Center; February 6, 1979 from Jean Smith, Director of Admissions, The Brown Schools; February 20, 1979 letter from Elwood Smith, The Devereux Foundation; April 4, 1979 letter from Adrienne Seidel, Willowglen Academy. All letters were to John Graham, Principal, Morton Grove Public Schools.

[6] November 14, 1979 letter from Donald Fritz, Director, Willowglen Academy to Gary Hahn, Director, Secondary Program, Niles Township Department of Special Education (NTDSE).

[7] September 5, 1979 letter to Gary Hahn, Director, Secondary Program, NTDSE from Gail Lieberman, Manager, Approval Section, ISBE.

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under Federal and State law.[8] Staff from another private facility have said that they are unable to accept GPCRB-approved rates as this would result in the facility charging Illinois different fees from those charged to other jurisdictions.[9]

The cost factor also affects children already placed in FAPE facilities. One residential facility in Wisconsin serves seven handicapped children whose educational placements are funded by the Illinois Department of Mental Health/Developmental Disabilities (DMH/DD). The facility does not have GPCRB-approved rates for its educational program. Although the facility filed an appeal with GPCRB, the facility's director wrote to one LEA that time is running short for the seven students placed there:

> As of September we are no longer receiving any education payments, a situation that my Board of Directors is not going to tolerate for any extended period of time. Nor, for that matter, will the State of Wisconsin, which takes a dim view of Wisconsin's subsidizing out of State placements where those states attempt to pay less than Wisconsin's residents for care here.[10]

B. *Insufficient Residential FAPE Facilities Exist To Meet the Needs of Illinois Handicapped Children*

OCR has identified numerous handicapped children who are being denied FAPE because of the extremely limited number of residential facilities willing to accept them at GPCRB-approved rates.

Michelle A. remained in a too restrictive hospital setting for several months before the LEA could locate an appropriate residential facility with GPCRB-approved rates. Two months after a placement was facilitated, the LEA was notified that GPCRB failed to approve a rate increase for the following (1979-80) school year. The facility reluctantly agreed to keep Michelle, pending an appeal before the GPCRB. However, soon thereafter, Michelle ran from the facility and she was returned home. This action is not the facility's usual response to truancy. In September 1979, LEA personnel believed that Brown School, an intensive psychiatric setting, was her last hope for placement. The School, however, does not have GPCRB-approved rates. Actual costs of the Brown School is $30,600 per year ($83.84 per diem). The GPCRB allowable cost is $14,700 per year. A pre-condition of placement by Brown School authorities is that the LEA be responsible for the full costs. The LEA, therefore, has urged the parent to obtain an Individual Care Grant (ICG) from the Department of Mental Health/Developmental Disabilities (DMH/DD) to cover costs. (*See* Section E-3, *infra* for related problems.) But the ICG does not cover the full costs of an Intensive Care Unit (ICU) which Michelle might require at some treatment stage. The School refused to admit Michelle without a guarantee that ICU and initial evaluative charges would be covered. As of December 10, 1979, Michelle has been placed in the Larkin Home pursuant to a DMH/DD-ICG.

Shawn E. is another youngster [whom the] LEA had tried for over nine months to place in a residential FAPE. Both the LEA and parents agreed that Brown School is the most appropriate placement for Shawn. On September 28, 1979, the LEA was cited by OCR for non-compliance with § 504 because it failed to provide Shawn a FAPE.[11] The LEA requested direction from ISBE regarding Shawn's placement at Brown School.[12] ISBE replied:

> You can place Shawn at Brown School, assuming eligibility and admission has been addressed, and pay only up to the level of tuition and room/board authorized by the Governor's Purchased Care Review Board . . . You have the responsibility to provide or purchase an appropriate placement for Shawn.[13]

ISBE further encouraged the use of an ICG from DMH/DD if Brown School was Shawn's only alternative. The $100 per month responsible relative liability clause was viewed by ISBE, however, as a "remaining catch."[14] (*See* Section E-3 *infra*. As of November 20, 1979, the LEA had over 15 written communications with ISBE, GPCRB, DMH/DD and a State Legislative Representative to facilitate Shawn's placement, all to no avail. Eventually, the LEA agreed to contract with Brown School for Shawn's placement and guarantee payment for all appropriate costs.

In November 1979, the Niles Township Department of Special Education (NTDSE) identified six children in its district who required and were not receiving an appropriate residential placement. The following is a status list of those children provided by NTDSE.

"Ken — Placed in another hospital; first one kicked him out; will get better only if placed in a long term residential school;

David — Refused home instruction; tried regular high school and failed; more police problems;

Jim — May go to CEDU with parents paying approximately $7,000 a year for at least two years;

George — Was placed at Read Center because of deterioration that occurred last spring during a four

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[8] September 13, 1979 letter to Gary Hahn from Joanne Brooks, Director, Riverview School; October 17, 1979 Mailgram from Michael DeSisto, DeSisto at Stockbridge School to Gary Hahn; October 17, 1979 Mailgram from Gary Hahn to "People Who Care and Others" (cc: to persons including Ms. Day, Mrs. Lieberman)

[9] August 23, 1979 letter from Gerald E. Davidson, Medical Director Elan One to Joseph M. Cronin (ISBE).

[10] *See* Footnote 6, *supra*.

[11] September 28, 1979 OCR Letter of Findings against Mundelein Elementary School District #75.

[12] November 5, 1979 memorandum from L.D. Vuillemot, Superintendent, Special Education District of Lake County (SEDOL) to Gail Lieberman, ISBE and JoAnn Day (GPCRB).

[13] November 13, 1979 letter from Gail Lieberman (ISBE) to Larry Vuillemot (SEDOL).

[14] October 10, 1979 letter from Gail Lieberman (ISBE) to Larry Vuillemot (SEDOL).

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month period when no FAPE residential facility was available;

Neil — Will probably go to jail before Elan has an opening; no other FAPE will take him;

Troy — No opening at Elan; refuses home instruction; no other FAPE facility will take him;

Michael — No FAPE now for 12 months; ordered by Dr. Cronin (State level appeal) to place him at Elan; no openings at Elan; no other FAPE facility will take him."

According to NTSE staff, "there is no such thing as an appropriate interim plan for these youngsters. They either get what they need or they 'come apart'."[15]

C. *Complexity of Rate Review System Contributes to Placement Problems Associated with the Provisons of FAPE*

OCR has identified handicapped children whose residential FAPE was denied or delayed, in part, because of confusion over the rate review structure.

In the Christopher K. case, OCR was told by the LEA that it unknowingly referred Christopher in July 1979 to a residential facility without GPCRB-approved rates. The facility had appeared on one list indicating its program "eligibility" status. The fact that the school had not been approved by the GPCRB did not come to the district's attention until after the child attended a preplacement weekend at the facility and had been accepted for placement [in] late September 1979.

In the Shawn E. case, Shawn was denied placement at a facility because of insufficient GPCRB-approved rates. ISBE told the LEA that the facility's "rates could be higher by the GPCRB if their data was clearer, particularly for capacity. If revised data is forthcoming, Illinois' rates could change."[16] The child, meanwhile, remained unserved.

In the Gregory J. case, a parent was told during a multidisciplinary staffing that the LEA's legal department had advised the LEA not to recommend any placement it could not pay for. As a result, members of the staffing team declared that even though a residential facility was appropriate, they could not facilitate this placement and, instead, recommended a special education class in the public school. Months later, a residential facility was recommended by an impartial hearing officer.[17]

The confusion at the LEA level is complicated by the fact that so few residential facilities have received timely GPCRB approval to educate children with severe handicaps. Although "dozens of facilities" received GPCRB approval, 95 facilities appealed approved costs set by the GPCRB for the 1978-79 school year. As of September 5, 1979, 5 appeals remained. New rates for the 1979-1980 school year have been established and new appeals will be heard.[18]

D. *Great Numbers of Handicapped Children Are Placed in Residential Facilities Outside of Illinois*

On September 6, 1979, the State Advisory Council on the Education of Handicapped Children created a special study committee. The committee was mandated to study, in part, the practice in Illinois of placing handicapped students in residential facilities outside of the state. While ISBE's letter of January 17, 1980 states that the number of out of state placements has been decreasing over the past several years, the problem is still severe.

In a November 1, 1979 discussion paper entitled Illinois Plan for the Provision of Comprehensive Services for Emotionally Disturbed Students, the State Advisory Council documented the extent to which behaviorally/emotionally handicapped students were placed in residential facilities in other states. According to the Council report, approximately 7,000 students have been placed by Illinois LEAs into GPCRB-approved private facilities. Children classified as behaviorally disordered numbered 2,500. Of these children, 603 required residential FAPE. Half (297) "cannot be accommodated in Illinois because of the lack of appropriate residential facilities within the state, public or private." Additionally, another 200 children with other handicaps are placed in residential facilities in other states.[19]

E. *Parents Pay Part/Total Costs of Appropriate Residential Facilities*

Section 14-7.02 of The School Code of Illinois allows ISBE and LEAs "to pay only the special education and room and board costs approved by the Governor's Purchased Care Review Board. Any other expenses not noted on these listings, *i.e.* ongoing medical services, are the responsibilities of the parents or a third-party payor."

As discussed *supra*, a major problem in expediting placements for handicapped children is the cost differential between residential facilities' actual costs and GPCRB-approved costs. For some facilities, this cost difference is enormous. For example, the Brown School in Texas was approved by the GPCRB for $14,700. Actual cost established by the School is $30,000. Thus, Illinois parents must guarantee as much as $15,000 in payment before their children can receive what they and the LEA may consider to be the only appropriate educational placement available. In this situation, delivery of appropriate educational placements is a function of the parents' ability to pay.

In the past, when private facilities have threatened to return home handicapped children because of low GPCRB-approved rates, GPCRB and ISBE have negotiated new rates to avert a crisis. As pointed out in your letter dated January 8, 1980, the rate discrepancy at Elan One and DeSisto School was resolved in this manner. Parents, however, continue to

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[15] August 29, 1979 Private Residential Facilities Placement Status Report by Gary Hahn (NTDSE).

[16] September 24, 1979 letter from Gail Lieberman (ISBE) to Larry Vuillemot (SEDOL).

[17] March 23, 1979 impartial due process hearing officer opinion from Maggi Reiss to Joseph Hannon, Chicago Board of Education.

[18] *See* Footnote 7, *supra*.

[19] November 1, 1979 Discussion paper — *See* Footnote 2, *supra*.

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pay out-of-pocket costs to keep their children at these schools. At Elan One, parents must pay over $900 before their handicapped children may attend. Parents must pay over $4,000 for their children to attend DeSisto School. These costs represent the difference between actual costs and GPCRB-approved rates. Because the GPCRB does not provide parents an itemized statement explaining the basis for tuition and room and board costs, parents and LEAs cannot analyze the basis for parental payment.

Information received from the Niles Township Department of Special Education, serving ten LEAs, revealed that as of August 29, 1979, 33 behaviorally/emotionally handicapped students in its jurisdiction required residential FAPE. Ten of the students were placed in private facilities whose GPCRB-approved costs were "drastically less" than actual costs. Five of the students were placed in private facilities whose rates had not yet been established for 1979-80. Thus, 15 families were faced with paying full/part payments or withdrawing their children from facilities. An additional 15 students remained unserved at the time. Also, out of 11 students with other handicaps placed in private residential facilities, one was receiving FAPE; the parents of one student were paying the cost difference; nine of the students were placed in facilities whose rates had not yet been established for 1979-80, resulting in the parents paying the entire cost. In sum, only three out of 44 handicapped children identified by NTDSE as requiring residential placement were being provided FAPE.

One factor contributing to the cost differential is the GPCRB's determination of what constitutes educational and noneducational costs. OCR reviewed the GPCRB's instructions to private facilities for completing the fiscal and statistical report for nonpublic schools, and corresponding report form. Of primary concern was Schedule IV—Allocation to Cost Centers and Programs. The instructions distinguish between direct service care costs which are educational and those which are noneducational. Facilities are instructed to make distinctions in accordance with Table One. Several of the distinctions made in that table are explained further in the instructions. The following illustrates service areas and distinctions made between educational and noneducational components.

SOCIAL SERVICES

It will be difficult to determine which social services are educational as opposed to noneducational. *The Governor's Purchased Care Review Board has decided that social services directly related to training should be considered educational, while those that are primarily therapeutic should be considered noneducational*. Thus, the allocation of costs will depend primarily on the IEPs of the *majority* of the pupil/clients. (Emphasis added.)

*Noneducational*
Counseling for *therapeutic* purposes, including counseling of parents of students receiving therapeutic counseling. (In practical terms, most counseling for non-DD [Developmentally Disabled] students will be noneducational.) (Emphasis added.)

*Educational*
Counseling related to *training* including counseling of and with parents of students primarily in training programs, as required by the IEP. (In practical terms, most vocational counseling and counseling for DD students will be educational.) (Emphasis added.)

PSYCHOLOGICAL SERVICES

The only psychological services which may be claimed as educational are those provided by a certified school psychologist. (One exception to this is consultation from other psychologists and psychiatrists with staff. Direct pupil contact by nonschool psychologists and psychiatrists is, however, a noneducational cost.)

*Noneducational*
All services of a psychologist who is not a school psychologist and any psychiatric services.

*Educational*
All services of a certified school psychologist as required by the IEP.

The GPCRB has issued Rules relating to cost reports and reimbursements. Rule 3.21 states, in pertinent part:

A. *Special education and related services costs*. The following shall be considered special education and related services costs:

1. Salaries, wages and fringe benefits for staff and fees for consultants involved in the direct delivery of educational services, including teachers, teacher aides, speech pathologists, audiologists, physical therapists, occupational therapists, social workers (insofar as they are performing counseling related to training rather than therapy), school psychologists, recreation workers (insofar as the costs related to activities undertaken before 3:00 p.m. on school days) . . .

* * *

C. *Other costs*. The following shall be considered neither special education and related service costs nor room-and-board costs:

1. Salaries, wages and fringe benefits for staff, and fees for counsultants not involved in the direct delivery of educational services as defined above; these costs include salaries of speech pathologists and audiologists insofar as they are conducting preventive care

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programs; social workers insofar as they are involved in therapeutic rather than training programs; psychologists other than school psychologists and psychiatrists (except to the extent that they are providing consulting services to the educational staff of the school); doctors, nurses and other medical personnel involved in the provision of ongoing medical care; and recreation staff, aides and child care workers who are involved in the delivery of some specific non-educational program.

As a result of these distinctions, parents must pay for some residential program costs not approved by the GPCRB. If the parents do not pay the costs, their child may either not receive necessary services, *i.e.* counseling, or remain at home.

2. *Handicapped Children Are Removed from Appropriate Residential Facilities when Insurance Coverage Is Depleted and Actual Costs Exceed GPCRB-Approved Costs.*

Insurance or other third party payments must be deducted from the allowable costs approved by the GPCRB. In other words, "any insurance should be off-setting revenue and is not in *addition* to the approved costs."[20] If insurance or other third party coverage remain after GPCRB-approved costs are paid, then this coverage could be used to pay for any other expenses not approved by the GPCRB.[21]

In Michelle A.'s case placement costs were paid by insurance. When the insurance was depleted the parent was contacted and asked to remove her child from the facility. The LEA, however, was not able to locate an alternative FAPE residential facility which was available at GPCRB rates. Another parent whose insurance coverage was depleted wrote to the GPCRB regarding her daughter who required the individual care unit at Brown School:

> When my insurance is exhausted this winter and when my savings are exhausted in the spring, [my daughter] will have to come home in the early stages of desperately needed treatment. She will still be unable to attend public school, will require close supervision and will not be ready to continue therapy on an outpatient basis. This problem is compounded . . . where Illinois has begun to pay room and board expenses only after insurance, which did pay them, has been exhausted thus depleting major medical benefits that could have extended treatment.[22]

[20] April 18, 1979 letter from Gail Liebernan (ISBE) to Gary Hahn (NTDSE).

[21] *See* Footnote 1, *supra*.

[22] September 20, 1979 letter to JoAnn Day (GPCRB) from Patricia E.

3. *Parents Are Urged by ISBE and LEAs To Apply for Individual Care Grants; Parents Receiving These Grants Are Liable for a Monthly, Sliding-Scale Contribution Cost.*

LEAs have been advised by ISBE and GPCRB to refer parents of handicapped children to DMH/DD for an Individual Care Grant (ICG) when appropriate residential facilities' actual costs exceed GPCRB-approved costs.[23] DMH/DD, however, has limited purchased care monies for mentally ill (MI) children. The MI program is:

> To assist families to place mentally ill children, for whom no appropriate care is available . . . Eligibility for the program is dependent upon age, family status, severity of psychopathology and need for psychiatrically oriented residential placement as opposed to hospitalization or a less restrictive community based service.[24]

The FY-1980 appropriation for ICG-MI is $1.3 million. Martin Kaplan, Children and Adolescent Services Coordinator, Sub-region 8, explained in an October 5, 1979 interview that ICGs are granted to eligible children as the money is available. Money is not available for all children who are eligible. Mr. Kaplan stated that in August 1979, Sub-region 8 alone had a backlog of 70 approved cases. He added that as of October 5, 1979 many children remained on waiting lists.

The unavailability of ICGs was evident in the Gregory J. and Shawn E. cases. In Gregory J.'s case, Mrs. J. was advised by the LEA that it would provide education for Gregory as soon as a placement was facilitated by DMH/DD or the Department of Children and Family Services (DCFS).[25] Mrs. J. applied to DMH/DD but the ICGs were depleted by September 1978, only two months into the fiscal year. Mrs. J. then requested assistance from DCFS to place Gregory in a residential facility. To receive assistance, Mrs. J. had to relinquish custody of Gregory to DCFS. Personnel from DCFS advised OCR that DMH/DD's and LEA's practice of referring parents to DCFS to obtain residential placement for their handicapped children was not an infrequent occurrence.

To make matters more complicated, if a child receives a placement funded by a DMH/DD Individual Care Grant and the placement is recommended by the LEA, the DMH/DD and LEA/ISBE process for approving facilities are not interrelated. According to Dr. Patricia Barger, Director of Chil-

[23] October 24, 1979 and November 13, 1979 letter from Gail Lieberman (ISBE) to Larry Vuillemot (SEDOL); November 14, 1979 letter from JoAnn Day (GPCRB) to Larry Vuillemot (SEDOL); Undated memorandum from Joseph Cronin to Regional Superintendants, Directors of Special Education, Nonpublic Facilities Administrators.

[24] Section 7.1 of the Powers and Duties of the Department of Mental Health and Developmental Disabilities.

[25] September 12, 1978 telephone notes prepared by Vivienne Cheatham, Coordinator Task Force South, Chicago Board of Education.

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dren and Adolescent Services, DMH/DD, and Martin Kaplan, the appropriate facility must be on the approved list of both ISBE and DMH/DD. While the GPCRB approves ISBE's allowable rates, the Office of Health Finances, along with the Rate Review Board (not the GPCRB), sets up DMH/DD ICG rates. Very few facilities are approved by both ISBE and DMH/DD. (*See* text of F.N. 10, *supra*.)

For handicapped children who do receive ICGs from DMH/DD, parents are responsible for a:

> Relative liability payment of up to $100 a month for up to twelve (12) years . . . . When using the sliding scale to assign parent liability payments, the Department of Mental Health and Developmental Disabilities (DMH/DD) is carrying out its legal mandate as stated in the Mental Health Code, Section 5-105 through 5-116. The sliding scale used is in Section 5-116. Title XIX may not be used for educational services and Title XIX and XX must be a fee scale.[26]

Accordingly, all parents of handicapped children receiving an ICG to fund an educational placement are liable to DMH/DD for up to $100 per month. Two OCR cases Anthony N. and Brent S. involve $100 per month payments made by parents in accordance with their liability under the DMH/DD- ICG funding scheme. OCR issued findings in the Anthony N. case against the LEA for its failure to provide Anthony free appropriate public education. The LEA agreed to reimburse Mr. N. to comply with § 504, notwithstanding ISBE's prohibition against such payments by the LEA.

Another problem is associated with the provision of ICGs by DMH/DD. The agency has more funds allocated for developmentally disabled (DD) children than for mentally ill children. OCR has been provided information that in at least two cases, Gregory J. and Michelle A., DD grants were offered as opposed to MI grants. Although the children were multiply handicapped, the presenting diagnosis was MI not DD. Placement of these children in DD-facilities were rejected by the parents because necessary services, such as therapy, would not be provided.

The problems associated with state inter-agency coordination and cooperation is not new. A due process Hearing Officer, in reviewing the related services provided to Brent S. by DMH/DD and the LEA, noted the lack of state inter-agency cooperation:

> On February 12, 1978, a letter to special education directors from Dr. Joseph M. Cronin introduced a memorandum of understanding between the Illinois Department of Children and Family Services, Department of Public Health, Department of Mental Health/ Developmental Disabilities, and the Illinois Office of Education. This memorandum of understanding purported to determine agency responsibility over programs and/or facilities for mentally and/or physically handicapped children. Dr. Cronin said that while the agreement did not attempt to dwell on all the areas of concern necessary to provide comprehensive services to exceptional children, it did represent a significant step toward that end.
>
> It seems reasonable to ask now some nineteen months later, if additional steps have been taken for the benefit of handicapped boys and girls.[27]

A Federal District Court is currently reviewing the lack of state inter-agency coordination (DMH/DD, DCFS, ISBE) and its effect on children who are wards of the Juvenile Court. (*David B. et al. v. DeVito, et al.*, U.S.D.C., N.D.Ill., Civil No. 79 C 1162) The fact situation will be the subject of an OCR compliance review for FY 1980.

F. *Section § 504 Violations*

ISBE has failed to provide a free, appropiate, public education (FAPE) to a sizeable class of handicapped children. FAPE for these children, according to their respective LEAs, requires private residential facilities with related services. ISBE's failure to provide these children a FAPE violates § 504 and its implementing Regulation, 45 C.F.R. Part 84.

As a direct recipient of Federal financial assistance from several HEW programs, ISBE and GPCRB are obliged under § 504 to eliminate discrimination on the basis of handicap in their programs and activities. [45 C.F.R. 84.1, 84.3(f)] ISBE and GPCRB share responsibility for remedial action in individual complaints against LEAs because of their exercise of control over the placement process. [45 C.F.R. 84.6(a)(2)] ISBE and GPCRB receive funds under Part B of the Education of the Handicapped Act as amended by P.L. 94-142. To qualify for these funds, ISBE made assurances that it is the state agency responsible and accountable for the education of handicapped children in Illinois. (*See* footnote, *supra*.) ISBE also made assurances, with respect to all HEW funds it receives, that its programs comply with § 504. Illinois LEAs are also recipients of Federal financial assistance and are required to comply with § 504 and its implementing Regulation. In response to cause findings made by OCR, two LEAs have made payments to facilities in excess of GPCRB-approved rates and have thereby violated rules established by ISBE.

OCR recognizes the legal restrictions placed on ISBE by § 14-7.02 of the School Code of Illinois. This section severely limits ISBE in its ability to provide FAPE for all handicapped students requiring residential facilities. (*See* discussion, *spupra*.) However, Article VI of the United States Constitution (The Supremacy Clause) provides that no State or State law shall be in conflict with the Laws of the United States or the Constitution. Regulations duly promulgated to implement a Federal statute have the effect of law.

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[26] March 8, 1979 letter from Joseph Fisher, Assistant Superintendent, Specialized Educational Services, ISBE, to Vernon Frazee, Superintendent, NTDSE.

[27] September 21, 1979 impartial due process hearing officer opinion from Don Fairmond to Arthur Johnson, Rockford Public School District #205 re: Brent S. at p. 9.

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Section 504's implementing Regulation at 45 C.F.R. Reg. 84.10(a) states:

> The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law that, on the basis of handicap imposes prohibitions or *limits upon the eligibility of a qualified handicapped person to receive services* . . . . (Emphasis added.)

ISBE has failed to provide many handicapped children a free appropriate public education as required by § 504. [45 C.F.R. Regs. 84.33, 84.34] This failure has been long recognized by ISBE staff, LEA personnel and the State Advisory Council for the Education of Handicapped Children. In fact, in your official capacity as State Superintendent of Education, you admitted this failure in a memorandum dated November 19, 1979:

> A need exists now, as it had for several years, for a comprehensive accessible continuum of special education and related services options for [behavior disordered/emotionally disturbed] students, including residential educational programs when necessary . . . As my staff and I review the *unmet needs of handicapped students in Illinois, this subject surfaces first and foremost*.[18] (Emphasis added.)

The State Advisory Council prepared a discussion paper to initiate the development of residential special education programs for the behaviorally disordered student in Illinois. In the paper, the Advisory Council stated:

> The practice of placing children out-of-state is accompanied by many serious problems, some of which are perceived to be approaching crisis proportions:
>
> 1) *Setting of rates* is a difficult and tedious process, frought with frustrating administrative problems. This is true in spite of the fact that the state has structured a rate-setting system under the Governor's Purchased Care Review Board.
> 2) Some *out-of-state residential facilities* are used disproportionately by Illinois due to service gaps. With demands from their resident states and with the increasing pressure for placement to lesser restrictive alternatives, even these *options are diminishing*.
> 3) It is *difficult or impossible* for local educational agencies or joint agreements to carefully monitor out-of-state placements and *participate meaningfully* in the development of *individualized education programs*. Communication problems proliferate under these circumstances.
> 4) *Parents cannot be closely related* to their children's *treatment* and educational programs when placement is miles from home. (Emphasis added.)
>
> Thus, one of the major goals of our society for the handicapped, service in the least restictive alternative, cannot be realized under these circumstances.[19]

Based on information obtained by OCR, there is sufficient evidence to establish that ISBE's and GPCRB's practices and policies result in the following specific violations which have the effect of denying many Illinois handicapped children a FAPE.

- Insufficient residential FAPE facilities exist to meet the needs of Illinois handicapped children.

Recipients must provide FAPE to each qualified handicapped child, regardless of the nature or severity of handicap. [45 C.F.R. Reg. 84.33(a)] GPCRB has failed to approve sufficient allowable costs for many private facilities approved by ISBE to provide education. Because of this failure, many of these facilities refuse to accept Illinois handicapped children. As a result, ISBE and LEAs have been unable to appropriately educate a large number of qualified handicapped children. GPCRB's failure to approve sufficient costs and ISBE's failure to provide FAPE violates 45 C.F.R. Reg. 84.33(a).

- Complexity of rate review system contributes to problems associated in the provision of FAPE.

Recipients may not, directly or through other arrangements, utilize criteria or methods of administration that:

(i) have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,
(ii) have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or
(iii) perpetuate the discrimination of another recipient if both recipients are . . . agencies of the same state. [45 C.F.R. Reg. 84.4(4)]

ISBE's and GPCRB's administration of their respective duties have contributed to the denial or delay of residential FAPE to handicapped children. This contribution stems from confusing approval/eligibility lists, a very complicated rate approval process, and long delays in the rate approval process. These administrative practices have the effect of subjecting qualified handicapped children to discrimination and impair the provision of FAPE to handicapped children. Furthermore, GPCRB's administrative policies and practices perpetuate the delay or denial of FAPE by ISBE. Such administrative acts violate 45 C.F.R. Reg. 84.4(4).

- Great numbers of handicapped children are placed in residential facilities outside of Illinois.

Whenever a recipient determines that it cannot appropriately educate a handicapped child in the regular educational environment, it must take into account the proximity of the alternate setting to the child's home. [45 C.F.R. Reg. 84.34(a)] Children should be placed as close to their homes as possible. [45 C.F.R. Part 84, Appendix A No. 24, Column 2]

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[18] November 1, 1979 Discussion Paper — *See* Footnote 2, *supra*.

[19] *Id.*

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Illinois' failure to provide many handicapped children a FAPE close to their homes has been acknowledged by the State Advisory Council for the Education of Handicapped children. The Council has warned that this failure "is accompanied by many problems, some of which are perceived to be approaching crisis proportion." (*See supra*.) GPCRB's and ISBE's policies and practices which have contributed to this situation violate 45 C.F.R. Reg. 84.34(a).

- Parents pay part/total costs of appropriate residential facilities.
    - Parents pay the difference between actual costs and GPCRB-approved costs.

ISBE has denied that parents are paying educational related costs when parents are asked to pay the difference between GPCRB-approved rates and actual costs of residential placements.

> Parents are paying, if necessary, for "non-school," or at least "non-education" and "non-room and board costs." The allowable costs set by the Governor's Purchased Care Review Board are designated to cover all allowable special education and related services costs and room and board . . . Those items excluded from the definition of "special education and related services . . ." are excluded from allowable costs, *i.e.*, ongoing medical costs . . . Districts are given the mandate to appropriately place all students![30]

Section 504, however, requires *residential programs*, including (but not limited to) non-medical care and room and board, to be provided at *no cost* to the parent when the program is necessary to provide FAPE to a handicapped child. [45 C.F.R. Reg. 84.33(c)(3) *See also*, EHA's implementing Regulation at 45 C.F.R. Reg. 121a.302] Furthermore, recipients must provide handicapped children an educational program which includes those aids and related services designed to meet their individual educational needs. [45 C.F.R. Reg. 84.33(b)]

GPCRB's designation of allowable rates excludes residential program costs if they are "non-educational" and "non-room and board costs." In particular, GPCRB does not approve therapy costs for mentally ill children because it has determined these costs to be "non-educational."[31]

Neither § 504 nor its implementing Regulation define the term "related service." They rely upon the definition of that term as provided in EHA's implementing Regulation (45 C.F.R. Part 121a), which states in pertinent part as follows:

> Reg. 121a.13 Related services.
>
> "(a) As used in this part, the term 'related services' means transportation and such developmental, corrective, and other supportive services *as are required to assist a handicapped child to benefit from special education*, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training." (Emphasis added.)

The terms "medical services" and "psychological services" are defined as follows:

> Reg. 121a.13(b)(4):
>
> "'Medical services' means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services."
>
> Reg. 121a.13(b)(8)
>
> "'Psychological services' include:
> (i) Administering psychological and educational tests and other assessment procedures;
> (ii) Interpreting assessment results
> (iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.
> (iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluation; and
> (v) Planning and managing a program of psychological services, including psychological counseling for children and parents."

Similarly, § 504 Regulation's use of the term "related service" included "psychological services." As HEW's interpretation of the Regulation states at 45 C.F.R. Appendix A — Analysis of Final Regulation, Subpart D, p. 413:

> "Special education may include specially designed instruction in classrooms, at home or in private or public institutions and may be accompanied by such related services as developmental, corrective and other supportive services (including psychological, counseling, and medical diagnostic services)."

More importantly, Congress did not intend to restrict the definition of the term "related services" to any list or category. What the handicapped child needs to assist him or her in benefiting from an education constitutes the essential criteria of related services. This is indicated in Congressional comments regarding the list of related services provided in EHA's Regulation at 45 C.F.R. Reg. 121a.13, as follows:

> "The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic

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[30] *See* Footnote 7, *supra*.

[31] April 16, 1979 memorandum to all Private Special Education Facilities from Robert L. Mandeville, Chairman of GPCRB, Re: Allowable Costs — 1979-1980 School Year at p. 22; GPCRB Rule 3.21-C-1.

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> and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education." 42 *Fed. Reg.* 42474, 42480 (August 23, 1977) [*See* 1 EHLR 11:451.]

On the basis of this Congressional policy, the argument that therapy, psychotherapy, etc. is an "on-going medical service" does not preempt the legal duty to provide medical, emotional or psychiatric services when it is shown that they are necessary to enable a qualified handicapped student to obtain the same result, to gain the same benefit or to reach the same level of achievement as a nonhandicapped student to the maximum extent possible. The key concept is that the education must be designed to meet the educational needs of handicapped students as adequately as the needs of the nonhandicapped students are met. Neither Section 504 nor EHA precludes an "on-going medical service" from constituting a related service.[32] In fact, it is the position of OCR that even a medical service, such as catheterization, may be a related service.[33]

Further, even if any state law or state educational policy advanced a contrary definition of the term "related services," Federal law would prevail. Section 504's Regulation, as well as EHA's, has the force and effect of law. *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Congress has delegated to HEW — and not a State educational agency, a Review Board or LEA — the authority to interpret and to apply § 504's Regulation. [29 U.S.C. § 794.] Federal Courts usually defer to a Federal agency's interpretation of its regulation where it is not plainly erroneous or inconsistent with the regulation. As the United States Supreme Court stated in *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945):

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. . . . In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."

The Supreme Court in Montana recently addressed this issue in the case *In re "A" Family*, 48 USLW 2346 (10/26/79) [3 EHLR 511:345]. The court, finding there was a conflict between State and Federal regulations, held that "the Federal regulations allowing for psychological services, which includes psychotherapy, overrides the State regulations which exclude psychotherapy." *Id* at p. 2347. Although the opinion was based on EHA, the analysis under § 504 is identical.

GPCRB's refusal to approve residential program costs and related services consistent with 45 C.F.R. Reg. 84.33(c)(1) and 45 C.F.R. Reg. 84.33(b) violates § 504. GPCRB's rate-fixing policies and practices prohibit ISBE from providing FAPE to many Illinois handicapped children. As a result, ISBE is also violating § 504.

- Handicapped children are removed from appropriate residential facilities when insurance coverage is depleted and actual costs exceed GPCRB-approved costs.

Section 504 does not relieve insurers or similar third parties from otherwise valid obligations to provide or pay for FAPE. [45 C.F.R. Reg. 84.33(c)(1)] Thus, insurance benefits may be used to cover appropriate educational program expenses.

However, in those cases where insurance benefits are depleted, ISBE remains obligated to provide FAPE [45 C.F.R. Regs. 84.33(c)(1) and 84.33(b)]. In those cases where insurance benefits have been depleted and the GPCRB approved rates fail to fully cover appropriate residential program costs, § 504 is violated.

- Parents are urged by ISBE, GPCRB and LEAs to apply for Individual Care Grants; parents receiving these Grants are liable for a sliding-scale, monthly contribution cost.

ISBE has denied that LEAs have any obligation to reimburse parents for money they paid to DMH DD as a condition precedent to receive an ICG for residential placement.[34] ISBE's position is based on § 14-7.02 of the School Code of Illinois which provides that "current law and practices relative to contributions by parents or guardians for costs other than educational or related services are not affected by [this Section]." Therefore, ISBE has advised LEAs:

> Unless it can be shown that the $100.00 per month paid to DMH . . . was specifically for educational services and not for other noneducational services, such as *residential care*, medical services, etc., the presumption

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[32] Two Letters of Findings (LOFs) have been issued by OCR to date against LEAs and State Educational Agencies (SEAs). The LEAs and SEAs violated § 504 because they failed to provide psychotherapy as a related service: October 17, 1979 LOF from OCR, Region I to the Commissioner of Education, Connecticut State Department of Education; July 26, 1979 LOF from OCR, Region IX to the Superintendent of Berkely Unified School District.

[33] Memorandum from Michael Middleton to Cindy Brown; ___ v. North Kansas City, Missouri School District" (August 14, 1978), cited in Department of Health, Education, and Welfare Handbook for the implementation of Section 504 of the Rehabilitation Act of 1973 (February 1979) at p. 218.

[34] July 23, 1979 letter from Bernetta Bush, Assistant Legal Advisor, ISBE, to Mr. Orval J. White, Director of Special Education, Lockport Area Special Education Cooperative; *See* Footnote 26, *supra*.

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> in favor of the validity of legislation would operate to require the parents [sic] under Chapter 961/2 § 100-7.1 to continue after the enactment of 94-142 legislation.[35] (Emphasis added.)

As stated previously herein, recipients are responsible for residential program costs, not merely "educational or related services" costs. Even if recipients were responsible to pay for "educational services" only, parents are in the weakest position to identify the services covered by their contribution. In fact, ISBE has stated that the parental contribution to DMH/DD which accompanies use of an ICG to fund an educational placement "is not apportioned to indicate whether it off-sets educational or noneducational cost of placement."[36] The presumption that parental contribution is for "noneducational services" absent hard-to-obtain evidence to the contrary, substantially prevents the provision of free education to many handicapped children. [45 C.F.R. Regs. 84.4(4), 84.33(c)] Contrary to ISBE's stated position above, if parents could show that their contribution was for *residential care*, 45 C.F.R. Reg. 84.33(c) specifically requires the program to be provided at no cost to the parent.

GPCRB has ruled that:

> Wherever a pupil/client meets the eligibility requirements of the Illinois Office of Education and some other state agency — and the other state agency has approved the placement of the pupil/client in accordance with its own rules and procedures — the other state agency shall be responsible for the room and board reimbursement for the pupil/client. *The Illinois Office of Education will reimburse for room and board payments only when no other state agency is involved in the placement of the child.* [Emergency Rule 3.31(5)] (emphasis added.)

The GPCRB Emergency Rule contradicts § 14-7.02 of the School Code of Illinois, as well as 45 C.F.R. Reg. 84.33(c). Section 14-7.02 provides that current law and practices relative to contributions by parents apply to "costs other than educational or related services." These services are interpreted broadly in 45 C.F.R. Reg. 84.33(c) to encompass residential program costs. The GPCRB Emergency Rule, however, disallows reimbursement whenever other State agencies are involved in the placement of the child. Yet GPCRB and ISBE have advised LEAs to request parents to seek funds from other State agencies, specifically DMH/DD, when GPCRB-approved rates are insufficient to fund an appropriate educational placement.[37]

Section 504 allows funds from public agencies to be used to meet the requirements of providing a FAPE. [45 C.F.R. Reg. 84.33(c)(1)] Nowhere is it stated or implied that use of other agency funds excuses the LEA or ISBE from its financial responsibilities. Residential program costs remaining unpaid after utilization of public funds are the responsibility of ISBE and LEAs. These funds are supplementary and do not offset entire recipient financial responsibilities. GPCRB's and ISBE's policies and practices deny many handicapped children free education when their parents must contribute to residential program costs funded by public agencies. The denial of free education violates § 504.

An impartial hearing officer came to a similar conclusion in the Brent S. case with OCR. Among other requests, the parents asked for a due process review of their responsibility to pay the $100 per month charge to DMH/DD.

The Hearing Officer stated:

> The local school district should investigate the Illinois Office of Education's posture regarding their assumption of the $100.00 per month maintenance cost charge for residency at Singer Zone Center. There seems to be absolutely no disagreement that Brent needs a 24-hour residential setting as part of his educational program. It would seem to follow that the Illinois Office of Education could and would utilize state discretionary funding through Public Law 94-142 for this purpose as they have for residential "room and board" costs generated for placements made under the auspices of § 14-4.02 of The School Code.[38]

## II. PROCEDURAL SAFEGUARDS ARE UNAVAILABLE FOR ISSUES RELATING TO FINANCIAL RESPONSIBILITY

OCR further finds that ISBE has failed to provide procedural safeguards which permit parents to obtain impartial review of decisions relating to issues of financial responsibility. Parents have alleged they were unable to obtain review of GPCRB non-allowable costs and DMH/DD-ICG parental liability payments for educational placements. Specifically, parents claim they have been denied that opportunity to have an impartial hearing officer determine whether these non-allowable costs and liability payments are for residential programs, which are to be provided by the recipient.

### A. *GPCRB-Approved Costs Are Not Subject to Due Process Review*

Parents in both the Michelle A. and Shawn E. cases requested due process hearings, pursuant to the Illinois Rules and Regulations to Govern the Administration and Operation of Special Education, to appeal the amount of approved costs for various residential facilities.

Michelle A.'s mother's request for a hearing relating to a number of issues was approved by the LEA. At the hearing Mrs. S. charged that many residential programs were unavailable to Illinois children because of the low rates approved by the GPCRB. The hearing officer, however, ruled that this issue could not be decided in a due process review. The hearing officer noted, nevertheless,

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[35] July 23, 1979 letter, *Id.*

[36] *Id.*

[37] *See* Footnote 23, *supra*.

[38] *See* Footnote 27, *supra*.

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> The documents and testimony indicates that . . . acceptance of Michele by several schools was hampered by their lack of acceptance of the approved rates set by the [GPCRB] and the impending appeals of those rates by several facilities . . .[39]

This decision was reviewed by the State Superintendent of Education and the conclusion of the hearing officer was sustained:

> An Article X appeal is not the appropriate forum to address issues relating to the State Board of Education's failure to appropriately monitor . . . approved costs of the [GPCRB] . . . The State Superintendent of Education, therefore, does not decide these issues.[40]

There is no mechanism, in Illinois, which permits parents or LEAs to appeal costs approved by the GPCRB. ISBE does not recognize the need for such review:

> The Governor's Purchased Care Review Board does have an appeal process tied in with their mission. Their mission is to establish allowable costs for tuition and room and board per eligible facility. Those facilities protesting the cost established may appeal via that process. In 1978-79, 89 facilities did. It is accurate that parents and districts cannot appeal but if their purpose is [sic] appealing is to seek a higher cost for a particular facility, that facility may accomplish that purpose under the current structure. I see no need for the latter two entities to appeal to the Governor's Purchased Care Review Board.[41]

Shawn E.'s parents' request for a due process hearing was denied by the LEA. The following reasons were cited by the LEA in refusing the request:

> 1. As your local school district of residence, we are in agreement with you on the appropriateness of the Brown School placement.
> 2. We will approve placement for Shawn at Brown's school under the provisions of Article 8 of the Rules and Regulations hereto cited.
> 3. Your school district of residence is willing to provide all approvable costs under Article 8 of the Rules and Regulations hereto cited as approved by the Illinois Office of Education.
> 4. Your school district of residence and you face a situation regarding approvable costs at the Brown's School facility and the discrepancy of the Brown School charges. This problem is not within the purview of your school district of residence but rests at the state level. I believe a hearing at the local level appears to be an exercise in futility and counter-productive to our mutual problem.

Section 504 requires recipients to provide procedural safeguards for decisions relating to financial responsibility for a program and whether a recipient has made available FAPE. [45 C.F.R. Regs. 84.33(b), 84.33(c)(4), 84.36] Shawn E. and Michelle A. are representative of handicapped children who require residential care to meet their educational needs. Residential care is dependent, in part, on decisions made regarding costs. ISBE's failure to provide parents a mechanism to review allowable costs is in violation of § 504 and its implementing Regulation. The fact that facilities may appeal rates approved by the GPCRB does not alleviate ISBE's responsibility to provide appropriate procedural safeguards to parents. Furthermore, GPCRB does not provide parents an itemized statement regarding costs it considers to be tuition, room and board, or medical. Without this statement, parents cannot adequately appeal the allowable cost determination. GPCRB's failure to provide parents procedural safeguards regarding financial liability violates § 504. As a result, ISBE is unable to comply with § 504.

B. *ISBE Considers Costs Paid by Parents to Other State Agencies Assisting in the Payment of FAPE To Be Inappropriate for Procedural Review*

In the Anthony N. case, Anthony's parents requested a due process hearing from the LEA to review whether they or the LEA was responsible for the $100 monthly fee charged by DMH/DD for an ICG. Mr. N. received an ICG from DMH/DD to pay for a residential facility Anthony required to receive an appropriate education. DMH/DD required the $100 per month to comply with its agency's rules requiring sliding-scale contributions by grantees. When Mr. N. requested DMH/DD to review the appropriateness of the $100 per month charge, he was advised by Dr. Robert DeVito, Director of DMH/DD to "appeal [his] case to the Illinois Office of Education the proper agency to resolve the issue of obligations . . ."[42]

The LEA denied Mr. N.'s request for a hearing. Subsequently, the LEA was advised by ISBE that its denial was appropriate and that unless the $100 charge was shown to be "specifically for educational services," the parents were liable for the charge. ISBE further advised that the LEA "is

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[39] July 1, 1979 impartial due process hearing officer opinion from Alice Farling to Edward E. Eckhardt, Superintendent, Morton Grove Public Schools, Re: Michelle A, at p. 9.

[40] September 12, 1979 Administrative Order, number SE-34-79 from Joseph M. Cronin to Edward E. Eckhardt, Superintendent, Morton Grove Public Schools, Re: Michelle A, at p. 3.

[41] October 30, 1979 memorandum from Joseph E. Fisher, ISBE, to Larry Vuillemot, Ron Hage, Vern Frazee, Gary Hahn, Gaydon Brandt, Joyce Christiansen, Stan Bristol, Jim Mooney.

[42] June 14, 1979 letter from Robert DeVito, M.D., Director, DMH/DD to Mr. Anthony N.

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**IN THE MATTER OF THE "A" FAMILY**
**No. 14815**

**IN THE SUPREME COURT OF THE STATE OF MONTANA, 1979**

**APPEAL FROM: District Court of the Eleventh Judicial District**

**Honorable Arnold Olsen, Judge, presiding**

**October 26, 1979**

**Corrected: October 30, 1979**

Counsel for Appellant: Ted O. Lympus, County Attorney, Kalispell, MT; Johnathan B. Smith argued, Deputy County Attorney, Kalispell, MT; Cannon and Gillespie, Helena, MT; Ross W. Cannon and Richard Gillespie argued, Helena, MT

Counsel for Respondent: John Albrecht argued, Choteau, MT

Action concerning educational placement of child claimed by the school district to be mildly mentally retarded and educable in county special education program. Parents obtained independent educational evaluation at their own expense and then requested that identification be changed to severe emotional disturbance, schizophrenic process, and that child receive out-of-state residential placement, including intensive psychotherapy. When school district denied request, parents requested due process hearing and, because of uncertainty in state procedures, named both the school district and the state Superintendent of Public Instruction as parties. Local and state hearing officers agreed with parents as to child's identification and requested placement, but dismissed Superintendent as a party. Thereafter, actions were filed in the State district court by both the parents (to require implementation of the hearing officers' findings) and the school district Board of Trustees (to challenge hearing officers' findings), which were consolidated. The district court generally affirmed the decision of the hearing officers and also entered a declaratory order that the administrative rules of the procedure adopted by the Superintendent created a dual hearing procedure in violation of the Education of the Handicapped Act, 20 U.S.C. § 1415.

On appeals by the Board of Trustees and the Superintendent, the Montana Supreme Court held that there was sufficient evidence to support the District Court's findings as to the identification of the child and that the requested out-of-state residential placement was consistent that the child be educated in the least restrictive environment. It also held that, while state regulations prohibited the furnishing of psychotherapy, state regulations provide for submission to federal regulations when a conflict exists. Since it concluded that EHA regulations, 45 C.F.R. 121a.13(a) and 13(b)(8) allow for psychological services, including psychotherapy, as a "related service," state regulations to the contrary must yield. Finally, the court held that Congress intended, in 20 U.S.C. § 1415(e)(1), that a party who has gone through the administrative hearing processes before a local and state agency shall be entitled to a final decision, subject only to court appeal. Since the Superintendent had taken the position that the decision of the district court would be binding without a right of rejection, there was no dual hearing procedure in violation of Federal due process requirements.

Judge Bennett, dissenting, concluded that the school district was not responsible for providing free psychiatric treatment because such coverage is not mandated by EHA or the regulations, 45 C.F.R. 131a.13, and is effectively excluded by state regulation.

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Child A is the male adopted son of H A and B A, the respondents in this case. Child A is within the age parameters of those entitled to special education as a handicapped child. The appellant is the school district in which the parents are residents. The appeal is from the mandatory injunctive order of the District Court, Eleventh Judicial District, Flathead County, requiring the school district to provide an educational placement for Child A including an intensive psychotherapy program at the Devereux Foundation, Santa Barbara, California, for one year. Transportation costs of the parents in connection with the placement of Child A were also required to be paid in the court's order.

The District Court denied the motion of the school district to amend or alter the findings of fact and mandatory injunction and this appeal timely followed.

For several years Child A was identified by the school district as mildly mentally retarded. He had been placed in the special education program in the public school system of

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his county, being "mainstreamed" into several classes for nonhandicapped students. His parents felt that he was not progressing in school and that he had periods of retrogression emotionally that made him uncontrollable, a danger to himself, and a threat to others. The parents took Child A at their own expense to the Developmental and Evaluation Clinic of the Children's Hospital in Denver, Colorado, for a complete educational evaluation. There the staff concluded that Child A was functionally retarded as a result of a primary handicapping condition of severe emotional disturbance, schizophrenic process.

The parents delivered the Children's Hospital report to the Child Study Team of their home school system. They asked that Child A's identification be changed to severe emotional disturbance, schizophrenic process. They further asked that Child A be placed at the Devereux Foundation, in Santa Barbara, California, to receive intensive psychotherapy, along with a residential school program.

The Child Study Team decided that Child A was not severely emotionally disturbed, schizophrenic process, but rather that he was mildly mentally retarded and that he should not be placed in the Devereux Foundation. The parents requested a special education hearing regarding Child A's identification and placement. A hearing, however, was not held because the rules then in effect on special education complaints were repealed by the Superintendent of Public Instruction.

On May 15, 1978, the state Superintendent adopted emergency rules for special education complaints (Montana Administrative Register, May 25, 1978, issue no. 5, pages 764, 770). The parents of Child A renewed their request for a hearing. They named both the school district and the state Superintendent as antagonistic parties.

A hearing at the county level was held first. The hearing officer found that Child A was severely emotionally disturbed, schizophrenic process. He concluded that Child A was in need of an intensive psychotherapy program in a residential school such as provided by the Devereux Foundation. He dismissed the Superintendent as a party.

The school district appealed to the Superintendent of Public Instruction, who appointed a hearing officer for another hearing at the level of the Superintendent's office. The parents again named the Superintendent as a party. The hearing officer reached the same conclusions as the hearing officer at the county level.

The parents filed cause no. 29516 in the District Court, requesting a mandatory injunction ordering the Superintendent of Public Instruction and the Board of Trustees of the school district immediately to comply with the hearing officer's decision. That suit was filed on August 21, 1978. On September 26, 1978, the hearing officer appointed by the Superintendent issued findings, conclusions, and an order which generally affirmed the order entered by the local hearing officer. On October 26, 1978, the Board of Trustees of the school district filed complaint no. 29,732 in the District Court, seeking review of the hearing officer's decision. Both cases were eventually consolidated. The hearing officer that had been appointed by the Superintendent of Public Instruction also dismissed the Superintendent as a party.

On March 20, 1979, the District Court entered its findings of fact, conclusions of law, mandatory injunction and declaratory judgment, generally affirming the decision of the hearing officer, and requiring an educational placement of Child A in the Devereux Foundation for one year. The court also entered a declaratory order that the administrative rules of procedure adopted by the Superintendent of Public Instruction created a dual hearing procedure in which a parent must also proceed against the Superintendent of Public Instruction in this type of case. The District Court declared that such procedure violated the Education of All Handicapped Children Act of 1975, 20 U.S.C., § 1415, on the ground that the administrative rules prevented a final decision being made where both the Board of Trustees and the Superintendent of Public Instruction were not a party to the same procedure.

The school district, through its Board of Trustees, appeals from the mandatory injunction finding that Child A is severely emotionally disturbed, schizophrenic process and requiring that he be placed for one year in the Devereux Foundation. The Superintendent of Public Instruction appeals from the order of the District Court requiring that she be a party for final decision in the case at bar, and from the conclusion of the District Court that her administrative regulations deprived the parents of due process.

The school district presents these issues for review:

(1) Insufficiency of the evidence to support the findings of the District Court that Child A is severely emotionally disturbed, schizophrenic process, requiring his institutionalization at Devereux.
(2) Whether the institutionalization of Child A is in compliance with the requirement that he be educated in the least restrictive environment.
(3) Whether the school district is responsible for the provision of psychotherapy for Child A.

At a hearing before the District Court in which all parties were represented by counsel, it was stipulated that "Montana is a state which receives assistance under Part B of the [federal] Education of the Handicapped Act, and that Georgia Ruth Rice is a state educational agency that receives assistance under Part B of the Education of the Handicapped Act." It was further stipulated that in this case the State of Montana is bound by the applicable provisions of Public Law 94-142, ___ Stat. ___, the federal Education for All Handicapped Children Act of 1975. The federal statutes relating to the education of handicapped persons are found in 20 U.S.C. beginning at section 1401. Section 1415(e)(2) of Title 20 allows a party aggrieved by administrative hearings such as took place here to appeal to any state court of competent jurisdiction. That section also provides:

> ". . . In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

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The District Court found that Child A was severely emotionally disturbed, schizophrenic process. It agreed with the Children's Hospital of Denver, Colorado, that Child A had perceptual difficulties, audio, visual and neurological incoordination and that Child A was classified as functionally retarded. His intelligence quotient has been measured at varying levels from 58 to 80. His academic progress showed a failure to learn; he had a history of periodic withdrawals from friendship, being socially insecure, fighting and complaining about being hurt; he had hidden in a bathroom for one-half hour at his school; had showed signs of frustration and nervousness. During his periods of withdrawal, his speech is slurred, he seems frightened, his dress habits are poor, and he does not appear to be oriented. He regresses to infantile behavior in these periods. Moreover, the District Court found that he had exhibited self-destructive behavior by running a razor over the back of his arm and standing in a dangerously hot shower. Doctors and Child Study Teams that had observed him reported him to be having severe emotional problems, severe emotional distress, and being emotionally insecure. Two hearing officers had determined that he was severely emotionally disturbed, schizophrenic process. Based on these findings, the District Court concluded that in order to give Child A an education appropriate to his needs, it was necessary that he be placed in Devereux for a period of one year, thereafter to be evaluated again.

The school district, on the other hand, claims that the findings of the District Court are insufficiently based on the evidence. It points to the evidence of Dr. William Cook, a clinical psychologist who testified that Child A is not seriously emotionally disturbed and that he does not demonstrate a functional retardation; that his mental retardation is not the result of emotional problems, but rather is true mental retardation, secondary to which are emotional problems. Dr. Cook emphasized that Child A had excellent care in his parents' home and was in an environment which is stimulating and productive to his overall growth. Dr. Cook also attacked the findings of Children's Hospital based upon the educational competence of the staff that evaluated Child A. Dr. Cook also doubted that the child was suicidal or self-destructive, or a danger to others.

Another witness, Ronald Holter, a clinician at the Comprehensive Development Center in Missoula, testified that he was able to understand Child A, and that Child A made no inappropriate responses or suffered no blackouts during the time he observed him. He also criticized the Denver report in the use of some of the tests that were described in the Denver report.

Some of Child A's teachers also testified. One testified that Child A gets along socially, had no discipline problems and is making progress. Another testified that Child A puts forth effort in class though he does not do as well academically as other students, but he gets along well socially. Two school psychologists testified observing no abnormal activity by Child A in class or on the playground. They disagreed with the recommendations of the Children's Hospital because that hospital did not observe Child A in the educational setting in which he had been placed.

The school district has argued that in this case involving a mandatory injunction, we are dealing with a matter of an equitable nature. Therefore it contends, our duty of review is governed by section 3-2-204(5), MCA:

> "In equity cases and in matters and proceedings of an equitable nature, the supreme court shall review all questions of fact arising upon the evidence presented by specifications of particulars in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless for good cause cause a new trial or the taking of further evidence in the court below be ordered. Nothing herein shall be construed to abridge in any manner the powers of the supreme court in other cases."

The order appealed from in this case is termed a "mandatory permanent injunction." If it were a true injunction, it would be equitable in nature, and perhaps section 3-2-204(5), MCA, would apply as to our duty of review. However, the true nature of the proceedings in the District Court was one of mandamus. Mandamus is an action at law, though it is sometimes controlled by equitable principles. 52 Am.Jur.2d 357 Mandamus § 32. The distinction between injunction and mandamus is noted as follows:

> "Another *material* distinction between the two remedies is found in the relief which they are designed to afford. Injunction is a remedy to restrain the doing of injurious acts or, in its mandatory form, to require the undoing of injurious acts and restoration of the status quo, while mandamus commands the performance of a particular duty which rests upon the defendant, or respondent, because of his official status or by operation of law . . ." 42 Am.Jur.2d 750 Injunctions § 19. (Emphasis added.)

The order of the District Court here in effect commands the school district to perform a duty that devolves upon it by operation of law. Its true nature is that of mandamus, and it should be governed by like consideration. *Miguel v. McCarl* (1934), 291 U.S. 442, 54 S.Ct. 465, 78 L.Ed. 901. Therefore, section 3-2-204(5), MCA, does not apply to our review here. We are not called upon to determine the issues of fact. Instead, the findings of fact by the District Court come to us for review on appeal in the cloak of Rule 52(a), Mont.R.Civ.P., not be set aside unless they are clearly erroneous.

Moreover, the school district maintains that the report of the Children's Hospital in Denver, to which the school district made objection at the time of the trial, should not have been received into evidence, and that the District Court should have struck that report from the evidence on motion of the district. On this argument however, the school district is foreclosed by the provisions of 20 U.S.C. § 1416(e)(2), which provides that "the court shall receive the records of the administrative proceedings." The report of the Children's Hospital is a part of the administrative record and accordingly it is a part of the evidence which the District Court had to consider in determining the preponderance. This special

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provision of federal statutory law overrides any other consideration with respect to the reception into evidence of the Children's Hospital report even though we recognize the inherent evil in accepting hearsay evidence not subject to cross-examination.

On review of the record, on the facts set forth above, we sustain the finding of the District Court that Child A is severely, emotionally disturbed, schizophrenic process, requiring his placement in an educational surrounding such as Devereux.

The next issue raised by the district is whether it is in compliance with federal and state statutes and regulations to place Child A in Devereux when those statutes and regulations require that handicapped children be educated in the least restrictive environment.

It must be admitted that the policy of the state and federal statutes is to place handicapped children as far as possible to be educated with children who are not handicapped. 20 U.S.C. § 1412(5) requires a state which desires to participate in federal funding to establish procedural safeguards "to assure that . . . handicapped children . . . are educated with children who are not handicapped, and . . . that separate schooling . . . occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . ." The Montana statute agrees (section 20-7-411, MCA). Yet the requirement is not ironclad because both the federal and state statutes provide that where the education of the child in regular classes cannot be achieved satisfactorily, separate schooling or other removal from the regular educational environment may be provided. Section 20-7-411, MCA.

The question becomes therefore whether the evidence supports the removal of Child A from the regular school environment in his county, or whether the special education program in his county, aided by such supplementary programs as the special education program of that county permits, is satisfactory to provide Child A with a "free appropriate public education." 20 U.S.C. § 1412(1); Section 20-7-411(1), MCA; *see* 1972 Mont. Const., Art. X, § 1.

Under section 20-7-414, MCA, the determination of what children require special education and the type of special education needed is the responsibility of the school trustees. The District Court concluded that the trustees in this case had abused their discretion in continuing to contend that the special education program in which Child A was participating in his home county was sufficient to meet his needs. The conclusion of the District Court stems from the facts which we have set forth above.

We find before us on the one hand the school district which contends that Child A is mildly mentally retarded, and the parents on the other hand who claim their child is severely emotionally disturbed. It is a difference in degree, but it is a difference the effect of which may be beyond our measure respecting the child. The District Court found from the evidence that as a participant in the mildly mentally retarded special education program, Child A is indeed severely emotionally disturbed. Once it had accepted that premise, it was necessary that Child A be placed in the Devereux Foundation school. The evidence supports no other choice.

> "In order to avoid any misunderstanding, it may be proper to add here that no more is required of the applicant [for a writ of mandate] than that he establish the material allegations of his complaint by a preponderance of the evidence." *State v. Ford* (1944), 116 Mont. 190, 202, 151 P.2d 171, 176.

Therefore, when we review this case under Rule 52(a), Mont.R.Civ.P., substantial evidence supports the finding. We affirm the finding of the District Court that Devereux is a proper placement for Child A.

We come now to the third issue raised by the school district, that is, that psychotherapy is not properly allowable as a related cost for Child A, and that such costs should be born by the parents or other public agency.

In large measure, this issue arises out of confusing if not conflicting federal and state statutes and regulations relating to special education.

The pertinent federal statutes relating to the case at bar are these:

> "Title 20, U.S.C. § 1401(1)
> "The term 'handicapped children' means mentally retarded, . . . speech impaired, visually handicapped, seriously emotionally disturbed children . . . who by reason thereof require *special education and related services*.
>
> "Title 20, U.S.C. § 1401(16)
> "The term 'special education' means specially designed instruction, *at no cost to parents* or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and *instruction in hospitals and institutions*.
>
> "Title 20, U.S.C. § 1401(17)
> "The term 'related services' means transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, *psychological services*, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.
>
> "Title 20, U.S.C. § 1401(18)
> "The term 'free appropriate public education' means *special education and related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in

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conformity *with the individualized education program required under section 1414(a)(5) of* this *title*.

"Title 20, U.S.C. § 1401(19)
"The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . who shall be qualified to provide . . . specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation, and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, *whether instructional objectives are being achieved*." (Emphasis added.)

Under the foregoing statutes, and others, the Department of Health, Education, and Welfare has promulgated certain federal regulations relating to the administration of the powers granted by the statute. The following definition contained in the regulations is pertinent:

45 C.F.R. 121a.5(b)(8) (1978):

"'Seriously emotionally disturbed' is defined as follows: (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects education performance:

"(A) an inability to learn which cannot be explained by intellectual, sensory, or health factors.
"(B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
"(C) Inappropriate types of behavior or feelings under normal circumstances;
"(D) A general pervasive mood of unhappiness or depression; or
"(E) A tendency to develop physical symptoms or fears associated with personal or school problems.
"(ii) The term includes children who are schizophrenic or autistic . . ."

We note parenthetically that Child A fits many of the criteria set forth in the definition of a seriously emotionally disturbed child.

"Related services," as used in the statute are administratively defined as follows:

45 C.F.R. 121a.13(a):
"As used in this part, the term 'related services' means transportation and such developmental corrective and other supportive services as are required to assist a handicapped child to benefit from special education, and includes . . . *psychological services*, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes . . .

45 C.F.R. 121a.13(b)(4):
"'Medical services' means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

45 C.F.R. 121a.13(b)(8):
"'*Psychological services*' include:
"(v) *Planning and managing a program of psychological services*, including psychological counseling for children and parents." (Emphasis added.)

We note from the federal regulations foregoing that "medical services" are provided only for diagnostic purposes and are paid for under the program when they result in establishing the child's need in special education and related services. On the other hand, "psychological services" are not so limited to diagnosis as specific authority is included for "planning and managing a program of psychological services" for the child which would come under the special education program.

The word "psychotherapy" is not specifically mentioned in the federal statutes or regulations. However, Webster's Seventh New Collegiate Dictionary (1965) defines "psychotherapy" as "treatment of mental or emotional disorder or of related bodily ills by psychological means." By that definition, psychotherapy comes within the meaning of the term "psychological services."

The Montana statutes on special education begin at section 20-7-401, MCA. The state definition of an emotionally disturbed child is consonant with that found in the federal provisions as is the definition of special education. The attendance of a child in an out-of-state special education program is authorized in section 20-7-422, MCA.

The conflict with respect to psychotherapy arises out of the state administrative regulations promulgated by the Board of Education, in conjunction with the Superintendent of Public Instruction, as found in 48 A.R.M. 2.18(22) S18430(2), as follows:

"When a child is handicapped to such a degree that a totally controlled environment is needed, residential school placement may be essential. Room and board and tuition costs are considered allowable costs in the district's special education budget. The public school is only responsible for room and board and the educational kinds of costs. *Other services*

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> ***such as psychiatric therapy and/or medical treatment must be deleted from the special education costs*** and assumed by parents and/or other agencies. When an out-of-district placement involves the payment of tuition or board and room, the placement must be approved by the Superintendent of Public Instruction." (Emphasis added.)

There is an obvious conflict between the specific deletion provided in the state administrative regulation above quoted, and the federal statutes and regulations which we have heretofore cited. The dilemma is answered however, by the state regulations which provide for submission to federal regulations when a conflict exists. 48 A.R.M. 2.18(46)-S18750 provides:

> "FEDERAL PROGRAMS GENERALLY. (1) There are several federal programs which have a portion of the program charged to serve handicapped children. Specific regulations published by each program must be followed as well as the *Special Education Rules and Regulations*. If the *Special Education Rules and Regulations* are in conflict with the federal requirements, then the federal requirements supercede (sic) . . ."

We therefore hold that the federal regulations allowing for psychological services, which includes psychotherapy, overrides the state regulations which exclude psychotherapy. We are comforted in this holding by the testimony of Dr. Paul Spoor, the federal programs manager in the office of the Superintendent of Public Instruction. He testified:

> ". . . As long as the local team of professionals, the Child Study Team, or as a result of a hearing like this one, as long as the professionals there rule that [Child A] needed the intensive psychotherapy or family therapy kind of services in order again to benefit from the public school instruction, those would be appropriate and allowable costs and we would certainly approve that."

The school district contends that our holding in *Doe v. Colburg* (1976), 171 Mont. 97, 555 P.2d 753, is controlling because there we held that the special education rules and regulations, which we have quoted above, as promulgated by the State, delete psychiatric therapy and/or medical assistance. However, we distinguish *Doe* insofar as it applies to this case. The effect of the federal statutes and regulations were not considered in *Doe* and moreover, *Doe* was involved with medical services provided by Dr. Kuska in Denver, Colorado. It is enough to say that we find psychotherapy is not regarded as medical services for the purpose of determining "related costs" under the special education program promulgated by the federal government but rather is included as part of psychological services, which are a part of the related costs. Since in this case it was stipulated that the special education program in the home county of Child A was funded in part by the federal government, the federal regulations apply and supersede whatever regulations the state may have promulgated to the contrary.

We turn now to the contention of the Superintendent of Public Instruction on her appeal that the District Court erred in determining that the regulations promulgated by the Superintendent offend due process in that a dual procedure is necessary to obtain approval of an out-of-state special education program.

The issue is more technical than real, as an examination of the statutes, regulations, and the record will reveal.

Section 20-7-422, MCA, provides with respect to out-of-state special education:

> "(2) Whenever the attendance of a child at an out-of-state special education program is approved by the superintendent of public instruction, it shall be the responsibility of the superintendent of public instruction, in cooperation with the department of social and rehabilitation services and the department of institutions, to negotiate the program for the child and the amount and manner of payment of tuition . . ."

The language of the quoted statutes implies that discretion is vested in the Superintendent in this case to grant approval or withhold approval for the out-of-state special education program. This implication runs counter to the language of the federal statutes which require that the decision of the hearing officer in the appeal to the Superintendent of Public Instruction is final. The applicable federal statute is 20 U.S.C. § 1415(e)(1), as follows:

> "A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) [the hearing conducted before the Board of School Trustees] of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section [the hearing conducted by the hearing officer for the Superintendent of Public Instruction] *shall be final*, except that any party may bring an action under paragraph (2) [providing for an appeal to the District Court] of this subsection." (Emphasis and bracketed material added.)

It is evident from the foregoing federal statute that it is the intent of Congress that a party having gone through the administrative hearing processes before the local agency and the Superintendent of Public Instruction shall be entitled to a final decision, subject only to court appeal. This means that once the hearing officer for the Superintendent of Public Instruction had reached his decision in favor of the A family, under the federal statute, the Superintendent had no further right of discretion as to approval or nonapproval of the out-of-state education plan.

It is apparent to us that the Superintendent understood this intent of Congress because in the regulations which she promulgated to administer the State special education program, and particularly with respect to hearings before her relating to proposed special education programs, it is provided "[t]he decision of the hearing officer is final unless a

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party seeks judicial review pursuant to section 82-4216, R.C.M. 1947, or brings a civil action pursuant to 20 U.S.C. 1415." Section 48 A.R.M. 2.18(42)-S18780(11).

The District Court received the impression during the trial that the Superintendent of Public Instruction had an adversary position to the A family with respect to the proposed program at Devereux. Because there was uncertainty, even among counsel, as to the extent of the Superintendent's right of approval or nonapproval of the application, the District Court denied a motion to dismiss the Superintendent as a party and eventually found that the State regulations instituted a dual procedure for approval which violated the due process requirement of the federal statute, 20 U.S.C. § 1415(b)(2).

Later during the trial, unfortunately, counsel for the Superintendent requested an opinion of Dr. Spoor as to the appropriateness of the proposed placement at Devereux. Over objection Dr. Spoor testified that it was his opinion that Kalispell rather than Devereux would be the appropriate program for Child A. He went on, however, to state that if the court ruled in Child A's favor, the Superintendent would approve the application without further claim of right of approval.

It was inappropriate for Dr. Spoor to give his opinion as to the advisibility of the proposed placement at Devereux because the decision of the hearing officer both at the local level and before the Superintendent was that Devereux was a proper placement and their decisions were final under the federal law and the State's regulations. Neither the Superintendent nor her agents have authority to overrule the hearing officer who is required to be impartial, although appointed by the Superintendent. 20 U.S.C. § 1415(b)(2).

Since, however, the Superintendent took the position during the trial that a decision of the District Court would be binding upon her and would be approved with no further claim of right of rejection on her part, such a stance was in harmony with the federal statutes, and with the State regulations. Therefore, we do not find a dual procedure rising out of the State regulations for special education programs, as long as the Superintendent maintains that she is bound by the findings of the hearing officer, and by the court, if an appeal is taken from the hearing officer.

The answer to the first contention of the Superintendent with respect to the claim of dual procedures under the regulations, also answers the second part of the Superintendent's appeal, that she is not properly a party to the case. The federal statutes and the State regulations contemplate that she not be a party. She has administrative duties, but she is limited and has no discretion with respect to special education programs decided either by the Board of School Trustees, or by hearing officers upon appeals from decisions of the School Trustees. The hearing officers were therefore correct in dismissing the Superintendent as a party to the controversy. Likewise, the Superintendent is not a proper party in a court appeal from such hearing officer as long as the Superintendent adopts the stance that she has no discretion once the court has acted. She would, of course, be a necessary party if at any time she contended that she had a right of discretion to approve or deny the application for special education after the hearing officers have acted, or after the court has made a final decision.

In light of the foregoing, therefore, the judgment of the District Court that Child A is severely emotionally disturbed, schizophrenic process, and requires placement in the Devereux Foundation for a period of one year, after which Child A shall again be evaluated, is affirmed; the decision of the District Court that the regulations promulgated by the Superintendent of Public Instruction for administrative hearings of appeals deny due process is reversed; the decision of the District Court that the Superintendent is a proper party to the action is also reversed, in view of the stance taken during the trial by the Superintendent that she had no power of discretion once the court had acted.

The Court commends the actions of the parties in providing for the placement of the child at Devereux Foundation pending the final decision of this Court.

### Dissenting Opinion

Neither the Superintendent nor the school district is responsible for providing free psychiatric treatment for Child A. Such coverage is not mandated by the Education of the Handicapped Act (Ch. 33, Title 20, U.S.C., § 1401-1461, incl.) and it is effectively excluded by state regulation 48 A.R.M. 2.18(22)-S18430(2).

The federal act contains definitions of relevant terms, specifically, "related services" and "free appropriate education." These terms are defined as follows:

> "(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, *psychological services*, physical and occupational therapy, recreation, and medical and *counseling services*, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. (18) the term 'free appropriate public education' means special education and related services which (A) *have been provided* at public expense, under public supervision and direction, and without charge, (B) *meet the standards of the State educational agency*, (C) include an appropriate preschool elementary or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under Section 614(a)(5)." (Emphasis supplied.)

The definition of "free appropriate public education" in 45 C.F.R. 121a.4 is identical to that in the code, with the exception of one word in the first part: ". . . special education and related services which: (a) *Are* provided at public expense, . . ." (Emphasis supplied.) Related services are further defined in 45 C.F.R. 121a.13. In that section, "'Counseling Services' means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel." "'Psychological services' include (i) Administering psychological and educational tests,

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and other assessment procedures; (ii) Interpreting assessment results; (iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; (iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and (v) Planning and managing a program of psychological services, including psychological counseling for children and parents."

The Act does not express the requirement that all "related services" mentioned in the Act *must* be provided by the State. A careful reading of the definitions of "appropriate public education" and the rest of the Act and the accompanying regulations disclose the intent of the Act to be two-fold. First, it is intended that *all* handicapped children will be provided with the "related services" it presently provides to *any* handicapped child. This purpose is reflected in the requirement that the local educational agency identify those handicapped children receiving the related services and those handicapped children who are not. (20 U.S.C. § 1414(a)(1)(A).) Second, it is intended that the Act be an incentive for the State to expand and improve its services to handicapped children. This is reflected in 20 U.S.C. § 1414(a)(1)(c) which requires establishment of a goal of providing *full educational opportunities* to all handicapped children. In other words, if the State wants to participate in the federal program it is required to offer to all handicapped children the related services which it presently provides to some, and which meet the standards of the Superintendent of Public Instruction, and it is also required to aim at improving and expanding its present services to ultimately achieve "full educational opportunities" for all handicapped children. The Act does not intend that every state provide every imaginable "related service" just because a handicapped child would benefit by it. And the "related services" listed in the Act are not exhaustive. See Comment after 45 C.F.R. Ref. 121a.13. Each state must develop its own standards and goals in achieving full educational opportunities for all handicapped children. The federal act is not attempting to compel each state to provide identical or fully comprehensive services.

Montana has its own standards for providing services to handicapped children. In 48 A.R.M. 2.18(22)-S18430(2), the Superintendent of Public Instruction has interpreted the federal act in such a way that psychiatric therapy and/or medical treatment is excludable from special education costs. In pertinent part this regulation provides:

> "The public school is only responsible for room and board and the educational kinds of costs. Other services such as psychiatric therapy and/or medical treatment must be deleted from the special education costs and assumed by parents and/or other agencies."

Three years ago, this Court announced it found this same rule and this same language ". . . is reasonable and entirely consistent with the carrying out of the legislative direction of Montana's statutes . . ." *Doe v. Colburg* (1976), 171 Mont. 97, 100, 555 P.2d 753, 754. Upon this finding, this Court set aside a District Court judgment ordering the Superintendent of Public Instruction to find a behavioral modification program to be carried on out-of-state by somebody with the title of "doctor." The issue was simply stated: ". . . whether special education funding can be used to provide psychiatric-medical treatment outside the State of Montana." The answer was an unequivocal "no." We are dealing here with the same funding, the same federal and state acts, the same regulation and the same kind of treatment. The only perceivable difference is that we have a different doctor and a different Superintendent. This Court now reverses itself on the ground it didn't consider the pertinent federal statutes and regulations three years ago. This year it holds the federal statutes and regulations require the financing of psychiatric-medical services. I have attempted to show there is no such requirement discoverable in the federal statutes and regulations. There is absolutely no showing that in the three intervening years the "feds" raised any question whatever, legally or administratively, about this Court's former ruling. As a matter of fact, the United States Commissioner of Education has continued since that time to approve of the "state plan" required to be submitted by the Superintendent of Public Instruction annually as a condition of funding (20 U.S.C. § 1413). This statute requires the Superintendent to disclose every conceivable facet of her education for the handicapped program except the names of her nearest of kin, and it clearly requires inclusion of all regulations propounded under the federal act. And, as would be expected, if the Commissioner finds the plan does not comply with the Act he may cut off the federal money (20 U.S.C. § 1413(c)(2)). There is, as has been noted, no showing whatever that the Commissioner has attempted to do so with regard to this or any other Montana regulation made under the Act.

The holding of the Court is that the federal regulations *allowing* for psychological services, which includes psychotherapy, overrides the state regulations which exclude psychotherapy. In the first place, the state regulations do not exclude psychotherapy; they exclude payment for psychiatric therapy and/or medical treatment. Psychotherapy, not mentioned in either the federal act or regulations, may well come within the gamut of the psychological services authorized by the Act and regulations. And one can hardly argue with the heirs of Noah Webster, called upon to decide this case, that psychotherapy is "treatment of mental or emotional disorders or of related bodily ills by psychological means." Psychiatric therapy may well be one of those means. The only question here, as in the *Colburg* case, is whether the Superintendent is required to pay for it. The holding of the

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Court answers the question. The federal act may *allow* psychiatric therapy. I understand there is considerable controversy in Washington and elsewhere on the point, but it does not *require* it, thus there is no conflict between the federal act and regulations and the state regulation. The state regulation is, then, authorized by federal and state law and is, therefore, to be treated as law, not as a policy statement. Contrary to what is said in *Colburg*, this substantive legislative rule is entitled to more than respectful consideration. Being duly and properly propounded in conformity with the applicable statute (section 20-7-402(2), MCA) it is as binding on this Court as a legislative enactment. Section 2-4-102(11)(a), MCA. To ignore or evade the rule is to repeal it, which is a legislative act, not a judicial function.

For this reason, I would remand the case to the District Court for modification of the order appealed from to exclude payment by the Superintendent of Public Instruction and the school district for psychiatric therapy and medical treatment.

I must note in passing that the Court, with its unquestioned procedural rulemaking power, has made a new rule of evidence in this case. That rule could be stated: if federal statutes require, the Montana Rules of Evidence may be waived. This is the net effect of the ruling made here with regard to reception and consideration of the report of the Denver Children's Hospital, loaded as it is with hearsay, speculation and confusing conclusions, without providing the appellants an opportunity to examine its authors. It is said the school district was foreclosed from objecting to consideration of this report by the District Court because 20 U.S.C. § 1415(e)(2) provides in part, "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, . . ." It could be that federal law may be invoked to nullify the provisions of parts (2) and (5) of section 2-4-612, MCA, the provisions of the Administrative Procedure Act requiring adherence at the administrative level to the rules of evidence and providing for cross examination of the authors of documents. And if the federal law requires it, I suppose there is no harm in the District Court receiving the entire record of an administrative proceeding, regardless of how filled up it might be with procedural and evidentiary error. But that cannot possibly mean that the District Court, in hearing and considering the matter, must disregard the rules of procedure and evidence in making its determination. Here there was, apparently, a timely motion to strike the report of the Denver Children's Hospital from consideration by the Court. In my opinion the motion should have been granted unless the authors of the report were presented to lay the foundation for its consideration and be subjected to cross examination with regard to it. To require less would be to abdicate the authority of the Montana courts and legislature to determine procedure and evidentiary qualification to the composers of rules for the United States Department of Health, Education, and Welfare. I would not do so.

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